NO. 42803-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

DENNIS L. MCCARTHY,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Cases

Other State Cases

Constitutional Provisions

Statutes

Other Authorities

Rules

I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Should McCarthy's convictions be affirmed where the trial court's act of providing office supplies to the jury during deliberations neither violated McCarthy's constitutional rights nor deprived him of a fair trial?

B. Did the trial court properly exclude evidence of the victim's alleged prior bad acts where the evidence was irrelevant and unduly prejudicial?

C. Did the trial court properly exclude an expert opinion that the relationship between McCarthy and his victim was "dysfunctional" where the opinion was not helpful to the jury's understanding of the evidence?

D. Was McCarthy tried within the time for trial rules where the proper disqualification of the prosecutor and the prescheduled vacation of the victim allowed additional time to bring McCarthy to trial?

E. Did the trial court properly allow evidence of McCarthy's prior bad acts where the evidence was admissible to prove the victim's reasonable fear of McCarthy and to explain the victim's delay in reporting the charged crimes to the police?

F. Did the trial court properly admit the victim's prior consistent statements after she testified, was subject to cross-examination and McCarthy implied during cross-examination that her trial testimony was fabricated?

G. Did McCarthy receive adequate assistance of counsel where defense counsel did not make unnecessary objections or request a limiting instruction that would have been improper?

H. Did the trial court properly deny McCarthy's motion for mistrial where a passing comment by the victim was immediately cured by the trial court and the jury instructed to disregard the comment?

I. Should McCarthy's standard range sentence be affirmed where the trial court properly found that the two offenses for which he was convicted were "separate criminal conduct" and calculated the offender score accordingly?

II. STATEMENT OF THE CASE

A. Facts

Dennis McCarthy was a longtime police sergeant for the Port Orchard Police Department. RP 191, 1004-06. In the summer of 2008, McCarthy began a romantic relationship with Tammy Carey. RP 190. Carey moved into McCarthy's home in Kitsap County. RP 190, 1024.

The relationship was tumultuous. Heated arguments were frequent and McCarthy physically abused Carey. RP 68, 195-198, 203, 876, 1039, 1148. Carey suffered the abuse without notifying police because she knew that if she called 911, a colleague of McCarthy's would likely respond to the call. RP 198. Carey feared that police responders would believe McCarthy's version of events over her own and would protect McCarthy, a situation that left Carey feeling hopeless. RP 198, RP 606.

In November 2008, Carey reluctantly[1] called 911 when McCarthy assaulted her and set fire to her belongings. RP 206, 772, 1044. McCarthy denied wrongdoing and told the police that Carey was the one who had assaulted him. RP 772. Only after playing an audio recording of

[1] Carey is the daughter of a 38-year veteran of New York City Police Department and was raised to believe that policeman are "gods" and women should never report domestic abuse by a policeman. RP 186, 197, 214. When Carey confided in her mother in 2008 that she reported McCarthy to the police, her mother's first response was, "How could you call 911 on a police officer?" RP 214.

McCarthy's actions that night was Carey able to convince the deputies that McCarthy's assertions were untrue. RP 212, 399, 772. McCarthy was arrested and charged with reckless burning. RP 1055.

The district court entered a domestic violence no-contact order that prohibited McCarthy from having any contact with Carey. RP 788-89. Carey lived in McCarthy's house at this time, which forced McCarthy to reside at the homes of police officers who were his friends. RP 215, 1046-49. McCarthy's friends in law enforcement repeatedly contacted Carey despite the no-contact order. CP 192-242 (Ex.99) **(Appendix A)**; RP 216, 219, 1154-1156. Carey did not feel protected by the order. RP 219, 226.

During a civil standby[2] on November 24, 2008, a commander from the Port Orchard Police Department allowed McCarthy and Carey to converse freely, in violation of the no-contact order. RP 221-23. The commander told Carey that she could call McCarthy despite the no-contact order. RP 1053. McCarthy reaffirmed this statement, knowing it was wrong, and told Carey, "I can't call you, but you can call me." RP 221-22, 1053. McCarthy told Carey during the civil stand-by that he could not get a police job if he was convicted of a crime. RP 222.

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[2] A "civil standby" is a procedure where a law enforcement officer accompanies a person restrained by a no-contact order to a residence where the protected person resides so that the person can retrieve personal belongings from the residence.

Subsequently, McCarthy and Carey spoke on the phone over 170 times in direct violation of the no-contact order. RP 223, 226, 1054-1055. McCarthy persuaded Carey to ask the prosecutor to "drop[ ] charges." RP 223. As soon as Carey agreed to do so, McCarthy's friends stopped calling and harassing her. RP 223, 226.

Several weeks later, on December 19, 2008, a pretrial diversion agreement was entered that avoided a criminal conviction for McCarthy and rescinded the no-contact order. RP 227-228, 789-90, 1062. Carey and McCarthy resumed their relationship and continued to reside together for the next several years. RP 228. Heated arguments and physical abuse of Carey continued and worsened. CP 192-242; RP 237. By January 2010, Carey had decided to leave McCarthy. RP 232, 239.

Carey secretly prepared to move out of McCarthy's residence for fear that he would be angry about her decision. RP 239, 232. In April 2010, Carey secretly leased a house in Aberdeen, WA, and enrolled in Washington State's "Address Confidentiality Program" so that her new address could not be traced through utility bills. RP 239. Carey secretly moved many of her belongings to a storage facility. RP 239.

Carey woke at 4:00 a.m. on the morning of May 2, 2010, the day she planned to leave McCarthy for good while he was at work. RP 268. McCarthy was already up and preparing to go to work. RP 268. Carey

verified that McCarthy was in the shower and then went into an upstairs bedroom to finish packing a suitcase. RP 271, 277.

Carey was knelt over the suitcase when she suddenly felt the barrel of a gun against the back of her head. RP 277. McCarthy said, "You crazy f---ing bitch, you are not going to destroy my life." RP 277. Carey believed McCarthy intended to kill her. RP 279. McCarthy was blocking the path to the door and Carey thought her only chance of survival was to escape out of the open window in the bedroom. RP 279. Carey thought if she could reach the window, she could hold onto the sill and lower her body outside, drop to the deck two stories below, and flee. RP 285.

Carey attempted to run to the open window, but McCarthy slammed her against a wall, pulled her up by her hair, faced her, and put a .38 revolver to her forehead. RP 281-82. In desperation, Carey "kick[ed] him in the balls," which momentarily incapacitated him. RP 282. Carey ran to the window and climbed into the frame, facing out. RP 281-82. There were drapes around the window. RP 274. Before Carey could turn and lower herself out of the window, McCarthy said, "Better the mess outside than in," and pushed Carey forcefully out of the window. RP 286.

Carey landed feet-first on the wooden deck below, fell to her right side, and struck her head on the deck. RP 288, 290. Carey lost consciousness. RP 289. When she came to she was lying on the deck and

felt extreme pain in her head and right ankle. RP 290. Carey tried moving but her body "wouldn't work." RP 292-93. Carey screamed. RP 293.

McCarthy called 911 only after Carey started screaming. Exhibit 41 **(Appendix B)**;[3] RP 73, 294. McCarthy told 911 that Carey was "hanging curtains" and "fell out the window." Exhibit 41. McCarthy was angry and belligerent with the 911 operator after the operator was incredulous that Carey would be hanging curtains at 4:00 a.m. Exhibit 41.[4] Due to McCarthy's hostility with 911, police responded even though no crime had been reported. RP 173.

Aid crews arrived about 15 minutes after McCarthy's 911 call. RP 80. Medics and police found Carey lying on the deck several feet from the house. RP 81. McCarthy was near her and pacing about. RP 85, 92. There was a fully intact and undamaged curtain rod, with attached curtains, lying on top of Carey. RP 81-82, 474, 495.

McCarthy repeated that Carey was hanging curtains in the bedroom when she fell. RP 501. Police noted that it was 4:30 a.m. and McCarthy's description of events seemed suspicious. RP 483, 506, 793.

Carey was uneasy at the scene. RP 476, 482. Carey told medics she feared the police because whenever she told them the truth about

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[3] Exhibit 41 is a transcript of the 911 audio recording from May 2, 20102, that was admitted as Exhibit 42 and published to the jury. RP 74.

[4] McCARTHY: She was hanging curtains.
911: She was what?

McCarthy, "it doesn't work out well." RP 87, 721. Carey told medics she did not want McCarthy to be able to see her in the hospital. RP 304, 490.

Carey suffered a "pilon fracture" that shattered the bones of her right ankle and lower leg. RP 556-58. A pilon fracture is painful and so devastates the bones that it is difficult to restore the weight-bearing ability of the ankle. RP 558. Carey spent five weeks at St. Joseph's Hospital in Tacoma and Harborview Medical Center in Seattle. RP 310-11. Carey endured five separate surgeries. RP 556-58. Carey can no longer put weight on her right leg and primarily uses a wheelchair. RP 332. Carey is in constant pain. RP 332.

Medical doctors at St. Joseph's Hospital in Tacoma noted that Carey was hesitant to disclose what had happened to her. RP 562. Carey's primary physician at St. Joseph's offered to help Carey contact the police, but Carey "was emphatic in refusing any local police involvement." RP 563. Carey told her doctor that because of McCarthy's employment, she did not trust local law enforcement. RP 563. However, Carey slowly began telling friends, hospital workers, and her victim advocate that she was intentionally shoved out of the window by McCarthy. RP 309, 434-436, 517, 563,593, 896.

Meanwhile, McCarthy offered varying descriptions of how Carey suffered her injuries. McCarthy called a friend from his cell phone while

following the ambulance to the hospital and told him that Carey went upstairs to smoke a cigarette and fell out of the window after tripping over a dog. RP 681. McCarthy repeated a similar version of events to his insurance company, colleagues at work, and to his domestic violence counselor. RP 701, 738-739, 880-82, 1180. McCarthy told others that Carey was sitting on the window sill smoking a cigarette when she fell out. RP 692,743, 747. McCarthy told others that he did not know how or why Carey went out of the window. RP 732. Finally, McCarthy wrote in his diary, months after he visited Carey in the hospital, that Carey leaned out of the window to smoke a cigarette and she fell. RP 1180-83.

In June 2010, Carey was discharged from the hospital. RP 317-18. Carey immediately retrieved her dog Ginger from McCarthy's home while he was at work. RP 319-21, 326. Carey found a new home to live in secret with Ginger and she felt safe and secure. RP 328. On August 31, 2010, Carey reported the events of May 2 to the police. RP 446, 447, 798.

The Kitsap County Sheriff's Office investigated Carey's report. RP 800-818, 822-834. An expert in biomechanics examined the scene, took measurements, and reviewed Carey's medical records and the police investigative reports. RP 909-15. The expert opined that Carey could not have sustained a pilon fracture unless she landed vertically and on her feet.

RP 916-17, 920-21. The expert opined that Carey could not have landed vertically and on her feet if she left the window headfirst. RP 919, 926, 928. The expert did not believe that Carey could have suffered the injury to her ankle by tripping over a dog and exiting the window headfirst; or by free-falling from a seated position on the window sill. RP 924-25.

Police served a search warrant at McCarthy's residence on November 30, 2010. RP 808. During the search, police found a .38 revolver in the home. RP 815. Carey identified the .38 revolver as the gun McCarthy put to her head on May 2, 2010. RP 229-30.

B. Procedure

McCarthy was charged with assault in the first degree for causing great bodily harm to Carey; assault in the second degree for putting the gun to Carey's head and placing her in reasonable fear that she would be shot; and ten counts of violation of a no-contact order for the over 170 phone calls in 2008. CP 57-70. McCarthy pleaded guilty to the ten counts of violating a no-contact order. RP 8-12.

The State was originally represented by the Kitsap County Prosecuting Attorney's Office. CP 288-94. Trial was scheduled for August 23, 2011. RP 9 (3/7/2011).

On August 12, 2011, the Kitsap County deputy prosecutors (DPAs) representing the State advised the court that during recent pretrial

interviews police officers made statements that made the DPAs impeachment and substantive witnesses in the case. RP 12-15 (8/12/11). The DPAs reported that the new information implicated the Port Orchard Police Department, the Kitsap County Sheriff's Office (including the Jail), and the Prosecuting Attorney's Office. RP 15 (8/12/11). The DPAs told the court that the information they received was unexpected and it was not possible for the DPAs to "ethically proceed" after receiving the information. RP 12-15 (8/12/11). The DPAs moved for an order disqualifying them from the case. RP 11-16 (8/12/11).

McCarthy's counsel expressed frustration with the delay that a disqualification would cause, but did not oppose the disqualification. RP 12-14 (8/12/11). The court ruled that Kitsap County was disqualified from representing the State. CP 1; RP 14 (8/12/11). McCarthy did not object to the written order of disqualification. CP 1; RP (8/12/11). The trial court reset the commencement date and found that the new time for trial expired on October 11, 2011. CP 1. McCarthy's counsel signed the written order without objection. CP 1; RP (8/12/11).

Kitsap County requested that the Attorney General's Office (AGO) represent the State. RP 28 (8/12/11). On August 15, 2011, the AGO accepted the case and assigned it to a prosecutor for trial. CP 269-71. Although the time for trial was extended without objection to

October 11, 2011, the trial itself was still set for August 23, 2011. Victim Tammy Carey advised the new prosecutor that she was traveling out of state to attend a wedding during the week of October 10, 2011. CP 269-71.

On August 18, 2011, the AGO appeared for the first time and requested a continuance of the trial date. RP 30-50 (8/18/11). The parties discussed the timing of the trial and the court reaffirmed its prior ruling setting the expiration for time for trial for October 11, 2011. RP 30-31 (8/18/11). McCarthy again had no objection to the court's computation of the time for trial. RP 31 (8/18/11).

The State moved to continue the trial date from August 23, 2011, to October 18, 2011, one week past the expiration of the new time for trial calculated by the court. RP 34 (8/18/11). The prosecutor advised that he could not be ready for trial in five days given the complexity of the case and the volume of discovery, which he had not yet received. RP 31-34 (8/18/11). The prosecutor advised that he could be ready by October 11, but Carey was unavailable that week due to her prescheduled trip. CP 269-71, 295-99. The State requested one additional week to accommodate Carey's vacation. CP 269-71.

The defense objected to the continuance on grounds that the new prosecutor could be prepared for trial in one to two weeks. RP 34-35

(8/18/11). The court found good cause to continue the trial and set trial for October 18, 2011. CP 300; RP 45-47 (8/18/11).

Trial commenced on October 18, 2011. RP 2. The trial court ruled on various pretrial motions from both parties. CP 243-240; RP 19-37. The trial court granted the State's motion to introduce evidence of McCarthy's prior bad acts towards Carey. CP 246-49; RP 37. The court ruled that evidence of McCarthy's past behavior towards Carey was admissible to prove the essential element of Carey's "reasonable fear" for Count II, and to explain why Carey delayed in reporting the crimes to police. CP 246-49; RP 37.

McCarthy moved to introduce evidence of certain prior bad acts of Carey under the theory that if the State was allowed to introduce McCarthy's "dirty laundry," the defense should be allowed to do the same with Carey in order to "level the playing field." CP 9-51; RP 24 (10/14/11); RP 33. The trial court granted the State's motion to exclude some of the alleged prior bad acts of Carey, although many more were admitted at trial. CP 243-245.

Tammy Carey was called by the State and testified that on May 2, 2010, McCarthy put a gun to her head and threatened to kill her; and then he forcefully pushed her out of the second-floor window. RP 277-290.

During cross-examination, Carey commented that there were "other things that I'm not allowed to talk about." RP 248. Defense counsel objected and moved to strike the remark. RP 248. The trial court struck the remark. RP 248. McCarthy moved for a mistrial based upon Carey's comment. RP 258-59. The motion was denied. RP 264-65.

Carey was vigorously cross-examined. RP 333-396; 410-417. McCarthy assailed the credibility of Carey's testimony during cross-examination by implying that her description of the assaults and her claimed fear of the police were a fabrication. RP 333-396.

Subsequent to Carey's testimony, the State elicited testimony that Carey made prior consistent statements describing the assaults and her reluctance to report the assaults to police. McCarthy's objections to this testimony were overruled. RP 516-17, 536, 897-98.

McCarthy offered psychologist Daniel Rybicki to provide expert testimony that the relationship between Carey and McCarthy was "unusual," "dysfunctional," and marked by domestic violence. CP 54-56; RP 26-29 (10/14/11); RP 955-56. McCarthy further offered Dr. Rybicki to describe numerous prior bad acts of Carey as part of the foundation for his opinion that Carey and McCarthy were a dysfunctional couple. CP 54-56. The trial court granted the State's motion to exclude Dr. Rybicki's

opinion on grounds that the opinion was irrelevant and the "foundation" was unduly prejudicial. CP 243-45.

McCarthy testified in his own defense. RP 1000-1185. McCarthy told the jury that he neither assaulted Carey with a gun nor pushed her out of the window. RP 1120.

At some point during the jury deliberations, the jury verbally requested a measuring tape and a roll of masking tape. RP 1324. The trial judge deemed the request "innocuous" and provided the requested items without notifying the parties. RP 1324.

Prior to bringing the jury into open court to deliver the verdicts, the judge informed the parties that he had provided the requested supplies to the jury. RP 1324. When defense expressed some concern, the trial court gave the parties the opportunity to object or seek relief from the court's action. RP 1324-25. McCarthy declined to take exception or request relief. RP 1324.

The jury returned verdicts of "guilty" and further found that the defendant was armed with a firearm during the commission of each crime. CP 99-105; RP 1325-26. McCarthy neither objected to the verdicts nor moved for a mistrial for any reason. RP 1325-26.

At sentencing, the trial court found that the two crimes were "separate criminal conduct" and calculated the offender score accordingly.

CP 250-260; RP 7 (11/10/11). The defendant received a standard range sentence. CP 250-260. This appeal follows. CP 261.

III. ARGUMENT

A. McCarthy's Convictions Should Be Affirmed Because The Office Supplies Provided To The Jury Did Not Violate McCarthy's Rights Or Deprive Him Of A Fair Trial

1. McCarthy failed to preserve a claim of error and the court should decline to consider it now

A party cannot "remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal." *State v. Kendrick,* 47 Wn. App. 620, 636, 736 P.2d 1079 (1987) *(quoting State v. Bebb*, 44 Wn. App. 803, 806, 723 P.2d 512 (1986)). This principle applies even to constitutional claims. *See Bebb,* 44 Wn. App. at 805-06 (constitutional right to self-representation).

In *State v. Williams,* 96 Wn.2d 215, 634 P.2d 868 (1981), the prosecution delivered late discovery midtrial that impugned the testimony of the only two eyewitnesses to the crime. *State v. Williams,* 96 Wn.2d 215, 634 P.2d 868 (1981). The two eyewitnesses had already testified. *Id.* at 218. The defense did not ask for a mistrial; nor did it attempt to recall the two eyewitnesses. *Id.* at 225. The defendant was convicted and appealed on grounds that he was unable to effectively cross-examine the two eyewitnesses due to the State's late disclosure of evidence. *Id.* at 225.

The court held that the defense forfeited any claim of error through its conduct:

> Petitioner had many opportunities to request a mistrial and never did so. ... It is obvious the defense did not feel greatly prejudiced by the late revelation of the incident until after the adverse verdict. The defense made a tactical decision to proceed, "gambled on the verdict," lost, and thereafter asserted the previously available ground as reason for a new trial. This is impermissible. [citations omitted]

Id. at 225.

Like *Williams*, McCarthy forfeited a claim of error. The trial judge specifically inquired of McCarthy whether he took "exception" to the court's actions. RP 1324. McCarthy asserts on appeal that he voiced "an objection"[5] at that point, citing RP 1324, but no objection is found there. Rather, McCarthy's counsel was equivocal and neither voiced an objection, moved for a mistrial, or sought any other relief. RP 1325. The trial court pressed again if there was a request for relief from the defense, but McCarthy's counsel responded "no." RP 1325. This conduct indicated McCarthy's decision to hear the jury's verdict rather than seek relief. RP 1325. McCarthy now challenges the court's action on appeal.

It is incumbent upon a defendant to request a mistrial when he is aware of facts that arguably deprived him of a fair trial. *Williams,* 96

[5] *Appellant's Opening Brief* at 16.

Wn.2d at 225. Here, McCarthy was acutely aware that he could request relief because he specifically declined the trial court's invitation to seek relief. McCarthy instead gambled on a favorable verdict. McCarthy lost the gamble and his tactical decision waived a claim of error.

2. The jury's request for office supplies was not a "jury question" relating to the law or the facts of the case

The criminal rules require that the jury be instructed "that any question it wishes to ask the court about the instructions or evidence" be submitted in writing and delivered to the bailiff. CrR 6.15(f). Jurors are presumed to follow the court's instructions. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

Here, the jury was given the required instruction but never submitted a written question about the law or evidence. CP 74-98 (Instruction 19). The "question" was a verbal request for office supplies.

The State disagrees that a verbal request for office supplies constitutes a "jury question" within the meaning of either CrR 6.15(f) or case law because a verbal request for office supplies does not ask for clarification of evidence or the court's instructions.

The trial judge, who was present and uniquely situated to assess the verbal inquiry, described the request as "innocuous." RP 1324. The court should find that the verbal request for supplies was not a "jury

question" that implicated either CrR 6.15(f) or the defendant's rights to a public trial and to be present with counsel.

3. The trial court's action was a ministerial one to which the right to public trial did not attach

A criminal defendant has a right to a public trial under the federal and state constitutions. *State v. Lormor*, 172 Wn.2d 85, 90–91, 257 P.3d 624 (2011). However, the right to a public trial applies only to "the evidentiary phases of a trial and to other adversary proceedings," and to the questioning of jurors. *State v. Rivera,* 108 Wn. App. 645, 653, 32 P.3d 292 (2001), *review denied,* 146 Wn.2d 1006, 45 P.3d 551 (2001). There is not a right to a public hearing on ministerial matters. *Id.*

This court has repeatedly held that the right to public trial does not attach to purely ministerial matters. *State v. Sublett,* 156 Wn. App. 160, 181, 231 P.3d 231, *review granted,* 170 Wn.2d 1016 (2010); *State v. Sadler,* 147 Wn. App. 97, 114, 193 P.3d 1108 (2008). McCarthy argues that this court's case law is "incorrect" and should be reconsidered. *Appellant's Opening Brief* at 18 n.3. McCarthy's argument is not persuasive and the court should follow its own precedent.

Providing office supplies to a deliberating jury is a ministerial act. The trial court's response to the verbal request was neither an "evidentiary phase of the trial" nor an "other adversarial proceeding," and therefore the

right to a public trial did not attach. The trial court placed the ministerial act on the record after-the-fact to keep the parties apprised.[6] RP 1324.

Moreover, not all violations of the public trial right result in structural error requiring a new trial. *State v. Momah*, 167 Wn.2d 140, 149–50, 217 P.3d 321 (2009). An error is structural when it necessarily render a criminal trial fundamentally unfair or makes the trial an unreliable vehicle for determining guilt or innocence. *Id.* Not all courtroom closures render a trial fundamentally unfair. *Id.* at 149-150.[7]

Here, there is no evidence of a courtroom closure. The record is silent as to how and where the trial court received and responded to the verbal request from the jury other than at the time of the request. The presentation of evidence was finished, closing arguments were complete, the jury was deliberating, and the parties were waiting for a verdict. A courtroom "closure" cannot be derived from this record. There is no logical reason to conclude that McCarthy's trial was "fundamentally

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[6] Courts view with favor the procedure of placing such discussions or actions on the record after the fact, and recognize that such procedures involve the trial court's essential duty to ensure efficient and fair trials. *E.g., In re Detention of Ticeson,* 159 Wn. App. 374, 246 P.3d 550 (2011).

[7] This court has held that parts of *Momah* were overruled *sub silentio* by *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed.2d 675 (2010). *State v. Slert,* ___ Wn. App. ___, 282 P.3d 101, (2012); *State v. Paumier,* 155 Wn. App. 673, 685, 230 P.3d 212, *review granted,* 169 Wn.2d 1017 (2010); *State v. Leyerle,* 158 Wn. App. 474, 482-86, 242 P.3d 921 (2010). However, *Presley* stands for the limited proposition that jury voir dire must always be held in public absent specific findings why the courtroom should be closed. *Presley, supra.* That issue is not present here.

unfair" or "an unreliable vehicle for determining guilt or innocence" because he was not present when office supplies were provided to the jury.

There was no structural error. At best, the jury may have used the tape to hang exhibits on the wall for better viewing or to create a diagram derived solely from the evidence admitted at trial. These are permissible activities. *See State v. Balisok*, 123 Wn.2d 114, 866 P.2d 631 (1994); *State v. Everson,* 166 Wn. App. 534, 536-37, 7 P.2d 603 (1932). It is unreasonable to conclude that the items played any impermissible part in the verdicts that were returned.

4. The jury's innocuous request for office supplies was not a "critical stage" of the proceedings

The accused has the right to the assistance of counsel at all critical stages of the proceedings against them. U.S. Const. amends. VI & XIV; Const. art. I, § 22; CrR 3.1(b)(2); *State v. Jackson*, 66 Wn.2d 24, 400 P.2d 774 (1965). The accused also has the right to be present for all critical stages of the proceedings. U.S. Const. amends. VI & XIV; Const. art. I, § 22; *State v. Pruitt,* 80 Wn. App. 802, 804, 911 P.2d 1034 (1996). A critical stage is one where evidence is being presented or where the defendant's presence has "a relation, reasonably substantial," to the fullness of his opportunity to defend against the charge.

United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 1484, 84 L. Ed.2d 486 (1985).

Here, the jury made an innocuous request that did not seek any clarification or comment on the evidence or the law. The court provided the jury with office supplies without comment. The items provided were not "evidence" any more than additional pens or notepads would be. The office supplies did not constitute anything for McCarthy to "defend" against. The request and the court's response was not a "critical stage."

5. There is no evidence of juror misconduct

Appellate courts are reluctant to inquire into how the jury arrives at its verdict. *State v. Gay*, 82 Wn. App. 423, 439, 144 P. 711 (1914). A party alleging juror misconduct has the burden to show that misconduct occurred. *State v. Reynoldson*, 168 Wn. App. 543, 277 P.3d 700, 702 (2012). A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts; and the secret, frank, and free discussion of the evidence by the jury. *State v. Balisok,* 123 Wn.2d 114, 118, 866 P.2d 631 (1994).

"Where the jurors attempt to re-enact the crime during their deliberations in accordance with their own recollection of the testimony, their conduct constitutes nothing more than an 'application of everyday perceptions and common sense to the issues presented in the trial."

State v. Balisok, 123 Wn.2d 114, 866 P.2d 631 (1994). A similar rule was stated in *State v. Everson,* 166 Wn. App. 534, 536-37, 7 P.2d 603 (1932):

> [T]he rule ... is to the effect that, if the experiment, or what the jury has done, has the effect of putting them in possession of material facts which should have been supported by evidence upon the trial, but which was not offered, this generally constitutes such misconduct as will vitiate the verdict. But if the experiment involves merely a more critical examination of an exhibit than had been made of it in the court, there is no ground of objection.

166 Wn. App. 534, 536-37, 7 P.2d 603 (1932). When jurors engage in re-enactments or experiments in the jury room that are based upon the evidence, "their conduct constitutes nothing more than an application of everyday perceptions and common sense to the issues presented in the trial." *Id.*[8]

On the other hand, the jury's consideration of novel or extrinsic evidence can be misconduct. *State v. Balisok,* 123 Wn.2d 114, 118, 866 P.2d 631 (1994) "Novel or extrinsic evidence is defined as *information*

[8] There are few Washington cases on this issue. California has a long line of cases holding that jury's do not act improperly by engaging in such conduct. *See, e.g., People v. Collins,*49 Cal. 4th 175, 110 Cal.Rptr.3d 384, 232 P.3d 32 (Cal. 2010) (jury's use of string and a protractor to reenact various alternative positions of victim and defendant according to the evidence was not misconduct; jury's use of a computer to draw a scaled diagram based on the evidence was not misconduct); *People v. Bogle,* 41 Cal.App.4th 770, 48 Cal.Rptr.2d 739 (1995) (jury's use of keys to open a safe, both of which were admitted into evidence, constituted "closer analysis of a trial exhibit," not misconduct); *Locksley v. Ungureanu,* 178 Cal. App.3d. 457, 223 Cal. Rptr. 737 (1986) (juror's act of driving his car with one eye covered to assess the breadth of his vision, an issue at trial, was not misconduct because it "did not invade a new field but merely [was] an experiment on an issue within the evidence, to wit, the ability of a one-eyed individual to drive"); *Wagner v. Doulton,* 112 Cal. App. 3d 945, 169 Cal. Rptr. 550 (1980) (drawing a scaled diagram based on the evidence not misconduct).

that is outside all the evidence admitted at trial, either orally or by document." *Id.* (emphasis added).

Here, there was nothing improper unless the jury acquired extrinsic evidence that should have been introduced at trial through the screen of the Evidence Rules. Masking tape and a ruler, or a length of measuring tape, are not extrinsic evidence. Under McCarthy's argument, the prosecutor would actually have to admit a ruler as an exhibit in order for the jury to consider measurements testified to or depicted in photographs.

This case is distinguishable from situations where items were provided to the jury which added information that could confuse or mislead the jury. For example, in *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 750 P.2d 1257 (1988), a Black's Law Dictionary was provided to the jury by the bailiff. The court found misconduct because the additional legal premises contained in the dictionary were not applicable to the facts of the case. *Id.*

Here, there is no record of what the jury did with the items that were provided. Even assuming that the jury measured something or taped something, or both, there is no evidence that the jury acted in violation of any law or instruction. There is no rational argument to be made that these items were used in a manner that impermissibly affected the verdict.

6. Any error in providing the supplies to the jury was harmless

Where the court has erroneous contact with the jury, the State may prove that the error was harmless. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). An error is harmless if there is no reasonable probability that the outcome of the trial would have been different. *State v. Mason*, 160 Wn.2d 910, 927, 162 P.3d 396 (2007).

The analysis is the same for the accused's right to be present with counsel for a jury question. Denial of the right to "appear and defend" is no longer conclusively presumed to be prejudicial. *State v. Caliguri*, 99 Wn.2d 501, 664 P.2d 466 (1983). When such an error occurs, "the defendant must raise the possibility that the communication between the judge and the jury was prejudicial and the State may demonstrate that the error was harmless." *State v. Bourgeois*, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997).

Here, it should first be noted that the trial court did not violate the Criminal Rules, which direct the court to summon the parties and provide an opportunity for input only when the jury submits a question about "the instructions or the evidence." CrR 6.15(f). The jury did not ask a question about the law or the evidence.

Second, the trial court's response of giving the requested office supplies to the jury was inconsequential. McCarthy seems to imply that the jury used the roll of tape and length of measuring tape for some nefarious purpose, but he does not identify what they could have done with it. What the improper purpose was is beyond reasonable thought. Giving office supplies to the jury did not create a "reasonable probability" that the jury would have acquitted otherwise.

B. The Trial Court Properly Excluded Evidence Of Carey's Alleged Prior Bad Acts Because The Evidence Was Irrelevant And Unduly Prejudicial

A criminal defendant has a constitutional right to present a defense, but the scope of that right does not extend to the introduction of otherwise inadmissible evidence. *State v. Aguirre*, 168 Wn.2d 350, 363, 229 P.3d 669 (2010). A defendant has the right to present evidence that a witness is biased against him, but only if the evidence is at least minimally relevant. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

The trial court may reject cross-examination where the circumstances only remotely show the bias or prejudice of a witness, where the evidence is vague, or where the evidence is merely argumentative and speculative. *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) (*citing State v. Robbins*, 35 Wn.2d 389, 396–97, 213 P.2d 310 (1950); *State v. Wills*, 3 Wn. App. 643, 645, 476 P.2d 711

(1970), *review denied*, 78 Wn.2d 996 (1971). A trial court's ruling on the scope of cross-examination is reviewed for manifest abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

McCarthy's argument that he was not allowed to "level the playing field" with evidence of Carey's bad behavior toward him is contradicted by the record. McCarthy was allowed to testify freely to his version of the prior bad acts alleged by Carey. The jury also heard hours of testimony about Carey's alleged prior bad conduct towards McCarthy from Carey.

McCarthy testified that Carey went "berserk" when she was angry, "[j]ust absolutely wild, angry, screaming and yelling." RP 1030. McCarthy testified that "when she gets enraged, there's just no reasoning with her." RP 1033. McCarthy emphasized Carey's rage, telling the jury, "unless you have actually seen it, it's very hard to describe." RP 1033. McCarthy testified that "Tammy wins her arguments by just keep on going at it until she gets angry and then starts breaking things." RP 1078. McCarthy testified his counselor thought that Carey had an anger management problem. RP 1074. McCarthy said he was "terrorized" by Carey. RP 1073.

McCarthy described an occasion when Carey "came over and hauled off and cracked me right across the face." RP 1032. McCarthy described a second incident when Carey "smacked me." RP 1039.

McCarthy described how Carey took his laptop computer during an argument and "smashed it to bits all over the floor." RP 1035. On another occasion, Carey smashed McCarthy's cell phone in a fit of anger. RP 1114-15. McCarthy once called the police because Carey refused to allow him to leave his bedroom. RP 1033. McCarthy testified that Carey committed numerous criminal acts, but he did not report them to police out of fear that Carey would retaliate by disclosing McCarthy's prior no-contact order violations. RP 1077.

McCarthy testified that Carey blackmailed him by threatening to disclose to police that he violated the no-contact order on numerous occasions in 2008 before the order was dropped. RP 1071. McCarthy testified that Carey "threatened all the time" to falsely accuse McCarthy of violating his probation if he did not do what she wanted. RP 1068, 1121, 1166. McCarthy testified that Carey was "controlling" and constantly monitored his computer and cell phone. RP 1068-70. McCarthy testified that Carey forced him to make a DVD recording wherein he falsely admitted wrongdoing so that she would not report him for violating the no-contact order. RP 1147. McCarthy described Carey secretly audio-recording him on multiple occasions. RP 1040, 1166.

Daniel McCarthy, the defendant's son, testified that Carey argued with him frequently, to include that she "yelled at me and gotten into my

face." RP 996-98. Carey created a rift between McCarthy and Daniel during Daniel's short leave from the Marines such that he could not stay at his father's home and spend precious time with him. RP 996-98.

Carey herself admitted that she argued with McCarthy and fought with him throughout their relationship. Carey admitted that a counselor advised her that she needed to read about anger management. RP 338.

Despite all of this evidence of prior bad behavior on the part of Carey, McCarthy argues that he should have been allowed to "complete the picture" of their relationship b by introducing more bad acts of Carey under the *res gestae* exception to ER 404(b). Primarily,[9] McCarthy argues that State's evidence that McCarthy tried to have Carey arrested for no reason should have been "balanced" with evidence that Carey once assaulted a stranger in a parking lot during a dispute about litter; and McCarthy talked the police out of arresting her. McCarthy argues that the defendant is always allowed to introduce evidence that the victim "abused" him if the State offers similar evidence, but the authorities he cites do not support this proposition.[10] McCarthy completely ignores that

[9] McCarthy does not identify which prior bad acts should have been admitted that were not, other than the store parking lot incident.

[10] McCarthy cites *State v. Jones,* 144 Wn. App. 284, 298, 183 P.3d 307 (2008) and *State v. Gefeller,* 76 Wn.2d 449, 455, 458 P.2d 17 (1969), but these cases address "opening the door" midtrial to otherwise inadmissible evidence, not evidence that has been considered and excluded after careful consideration during a pretrial hearing.

there were valid evidentiary reasons to admit the State's evidence, but not for his evidence.

Carey's reluctance to call police due to past history with McCarthy and local law enforcement was highly relevant to explain why Carey delayed reporting the crimes at issue. Conversely, evidence that years ago Carey may have pulled a necklace off of a stranger during a dispute about litter in store a parking lot, or that McCarthy convinced his colleagues not to arrest her, was not relevant to any fact or issue in the trial.

Furthermore, there was no self-defense claim in this case that made McCarthy's knowledge of Carey's alleged prior assault relevant to the case. Whether Carey "bullied" McCarthy in the past, assaulted a stranger in a parking lot, or was partly responsible for the poor relationship between the two was wholly irrelevant to whether McCarthy put a gun to Carey's head and shoved her out of a window. McCarthy's argument for admission of Carey's prior bad acts was essentially that Carey's argumentative behavior so incited him that his act of assaulting her could be excused. Jury nullification is not a valid reason to admit evidence of prior bad acts. *United States v. Rosenthal,* 266 F.Supp. 2d 1068 (2003), *reversed on other grounds,* 445 F.3d 1239 (9th Cir 2006).

The trial court excluded only a portion of the alleged prior bad acts of Carey that were offered because they were either irrelevant or so

minimally relevant to prove bias that it would serve no purpose in admitting them. The trial court exercised appropriate discretion.

C. The Trial Court Properly Excluded Dr. Rybicki's Opinion That Carey And McCarthy Had A "Dysfunctional Relationship" Because The Opinion Was Not Helpful To The Jury's Understanding Of Any Fact At Issue

At trial, the most defense counsel could say about Dr. Rybicki was that he would offer his expert opinion that Carey and McCarthy had an "unusual" or "dysfunctional" relationship marked by domestic violence. The trial court properly granted the State's motion to exclude this opinion.

1. The trial court properly excluded the opinion because the opinion was not helpful to the jury

ER 702 provides that if "specialized knowledge" from a qualified expert will "assist the trier of fact to understand the evidence or determine a fact in issue," then a qualified expert may testify in the form of opinion. If allowed to give an opinion, the expert may testify about the underlying information that supports his/her opinion even if that information would otherwise be inadmissible. ER 703.

A trial court's ruling on the admissibility of evidence offered under ER 702 is reviewed for an abuse of discretion. *State v. Russell,* 125 Wn.2d 24, 69, 882 P.2d 747 (1994). An appellate court will not disturb the trial court's ER 702 ruling if the reasons for admitting or excluding the

testimony are fairly debatable. *In re Detention of Coe,* 160 Wn. App. 809, 818, 250 P.3d 1056 (2011), *aff'd,* ___ Wn.2d. ___ 286 P.3d 29 (2012).

An expert's opinion must be relevant in order to be admissible. ER 402; *State v. Nelson*, 152 Wn. App. 755, 767, 219 P.3d 100 (2009). Even though relevant, evidence may still be excluded if it is unfairly prejudicial, would confuse the issues, or would mislead the jury. ER 403. A trial court's evaluation of relevance, and its balancing of probative value against its prejudicial effect or potential to mislead, is given "a great deal of deference." *State v. Luvene*, 127 Wn.2d 690, 706–07, 903 P.2d 960 (1995).

Here, McCarthy essentially wanted to "back door" inadmissible testimony about Carey's alleged prior bad acts by admitting them under the guise of "foundation" for Rybicki's opinion that Carey and McCarthy had a dysfunctional relationship. The trial court recognized that Rybicki's opinion was neither relevant nor helpful to the jury's understanding of any fact at issue. The trial court explained why in a detailed written order. CP 243-45.

The court found that an opinion from Dr. Rybicki on Carey's credibility was inadmissible; Rybicki's opinion that the Carey-McCarthy relationship was "dysfunctional" and "love-hate" was not helpful to the

jury; and the danger of unfair prejudice outweighed the probative value of the opinion. CP 243-45.

The trial court properly concluded that the probative value of Dr. Rybicki's opinion, even if some minimal relevance could be found, was outweighed by the danger that the testimony would unduly prejudice and/or mislead the jury. Carey's testimony, McCarthy's testimony, and Exhibit 99 established conclusively that the relationship was dysfunctional even if a label for the relationship was relevant (it was not). The jury did not need an "expert" to tell them that the relationship had dysfunction.

McCarthy mistakenly relies on *State v. Grant,* 83 Wn. App. 98, 920 P.2d 609 (1996) for the proposition that expert testimony about domestic violence is always admissible in a domestic violence case. The rule from *Grant* is that prior bad acts of the defendant may be admitted to explain why the victim remained with her abuser, minimized the abuse during testimony, or recanted prior abuse during her testimony. *State v. Grant,* 83 Wn. App. 98, 107-08, 920 P.2d 609 (1996). *Grant* has never stood for the proposition that the defendant may attack the credibility of the victim by introducing prior bad acts or an "expert opinion" that she is not credible. To the contrary, a witness, even an expert, cannot express an opinion on another witness's credibility. *State v. Wilber,* 55 Wn. App.

294, 299, 777 P.2d 36 (1989); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Dr. Rybicki's opinion was properly excluded.

2. Any error was harmless

Erroneous evidentiary rulings are subject to harmless error analysis. *State v. Dahl*, 139 Wn.2d 678, 688, 990 P.2d 396 (1999). If error at all, the exclusion of Dr. Rybicki's opinion was harmless. Even without Dr. Rybicki's opinion, it would have been impossible for the jury to conclude anything other than that Carey and McCarthy had a dysfunctional relationship given the evidence presented. An expert opinion to that fact added nothing to the case. The outcome of the trial would have been no different with Rybicki's opinion added.

D. McCarthy Was Tired Within The Time For Trial Because The Disqualification Of Kitsap County Reset The Time For Trial And There Was Good Cause To Continue The Trial One Additional Week

1. McCarthy waived a challenge to the trial court's computation of the time-for-trial by failing to object

CrR 3.3 provides that a party who fails to object within 10 days of the setting of the trial that the date is not within the time for trial "shall lose the right to object" that the trial occurred outside of the time limit. CrR 3.3(d)(3). Additionally, if the right to object is lost, the date of the trial "shall be treated as the last allowable date for trial." CrR 3.3(d)(4).

CrR 3.3(d) reflects the general rule that appellate courts will not review a claim of error raised for the first time on appeal unless the claimed error is manifest error affecting a constitutional right. RAP 2.5(a). The "time for trial" rules set forth in Criminal Rule 3.3 are not of constitutional magnitude. *State v. Campbell,* 103 Wn.2d 1, 15, 691 P.2d 929 (1984) ("Trial within 60 days is not a constitutional mandate"). Under both CrR 3.3 and RAP 2.5(a), McCarthy is not entitled to any relief because he did not object to the trial court's time for trial computation.

On August 12, 2011, the trial court entered a written order which reset the commencement date and determined that the new time for trial period expired on October 11, 2011. CP 1; RP (8/12/11). McCarthy expressed his frustration at the delay the disqualification would cause, but he did not object to the resetting of the commencement date. RP (8/12/11). When the parties appeared a week later on August 18, 2011, the trial court reiterated that the time for trial expired on October 11, 2011. RP 31 (8/18/11). McCarthy again did not object. RP 31 (8/18/11).

McCarthy did object to the motion to continue the trial date that followed the resetting of the commencement date, but the issue then was

whether there was good cause to continue the trial to October 18,[11] not whether the time for trial was properly reset. McCarthy never objected to the computation of the time for trial and he waived his right to appeal it.

2. The trial court correctly applied and followed the speedy trial rules

A criminal defendant jailed pending trial must be tried within 60 days of the "commencement date." CrR 3.3(b)(1)(i); CrR 3.3(c)(1). The commencement date "shall" be reset upon "[d]isqualification of the defense attorney or prosecuting attorney." CrR 3.3(c)(2)(vii). After the commencement date is reset, allowable continuances of the trial date are excluded from the time for trial period. CrR 3.3(e)(e).

CrR 3.3(c)(2) does not require a "valid disqualification affirmed on appeal." Rather, the rule simply provides that if counsel for one party is disqualified, the trial court "shall" reset the commencement date. CrR 3.3(c)(2)(vii). Here, there is no dispute that the court disqualified the prosecuting attorney on August 12, 2011. CP 1. The court strictly complied with the requirements of the court rule by resetting the commencement date, which then allowed another 60 days for trial.

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[11] McCarthy was tried one week after October 11. The trial court found good cause to continue the trial to October 11 to allow the new prosecutor to prepare; and one additional week to October 18 to accommodate Carey's prescheduled vacation. The unavailability of a material State's witness is valid grounds for continuing a criminal trial. *State v. Henderson*, 26 Wn. App. 187, 191-92, 611 P.2d 1365, *review denied*, 94 Wn.2d 1008 (1980). McCarthy has never challenged the good cause for this one additional week.

McCarthy argues that whether or not the trial court made the "right" ruling on the motion for disqualification determines whether the commencement date was properly reset and whether he was tried within the time limits of CrR 3.3. McCarthy argues for a result that is contrary to both the plain language of the rule and statutory interpretation.

When interpreting a court rule, the court applies rules of statutory construction. *City of Seattle v. Guay*, 150 Wn.2d 288, 300, 76 P.3d 231 (2003). An appellate court interprets court rules "as though they had been drafted by the Legislature." *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993).

Statutory interpretation begins with a statute's plain meaning. *State v. Landsiedel*, 165 Wn. App. 886, 891, 269 P.3d 347 (2012). When the plain language is unambiguous, the legislative intent is apparent and courts will not construe the statute otherwise. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Plain meaning is discerned from reading the rule as a whole, harmonizing its provisions, and using related rules to help identify the legislative intent embodied in the rule. *State v. Chhom*, 162 Wn.2d 451, 458, 173 P.3d 234 (2007).

If the court must go beyond the plain meaning of the rule, statutory interpretation requires courts to give effect to the legislature's intent and purpose in passing the law. *State v. J.P* ., 149 Wn.2d 444, 450, 69 P.3d

318 (2003). The interpretation must be made to avoid unlikely, absurd, or strained consequences. *Chhom,* 162 Wn.2d. 446.

In 2003, the Washington Supreme Court amended the time-for-trial rule with one stated goal being to "[r]educe the likelihood that criminal cases will need to be dismissed with prejudice." *State v. George*, 160 Wn.2d 727, 737, 158 P.3d 1169 (2007). CrR 3.3 must be interpreted consistent with the intent to reduce the likelihood that a criminal case is dismissed for time for trial reasons.

This court should hold that if counsel for one party is disqualified and the defendant is tried within the newly calculated time for trial, the speedy trial rules are not violated even if another court later determines that the disqualification was erroneous. This is especially true where there is no objection to the disqualification. Further, no violation of any constitutional right of the defendant would follow from such a holding because CrR 3.3 is not a constitutional mandate. *State v. Campbell,* 103 Wn.2d 1, 15, 691 P.2d 929 (1984). Such a rule is consistent with the Supreme Court's intent that the time for trial rules be construed where possible to avoid dismissing criminal cases with prejudice.

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3. The trial court properly disqualified the Kitsap County Prosecuting Attorney's Office

The conduct of lawyers in Washington, including prosecutors, is governed by the Rules of Professional Conduct (RPC). The preamble to the RPC recognizes that lawyers will sometimes be placed in difficult situations they cannot be expected to foresee:

> In fulfilling professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which a lawyer may encounter may be foreseen, but fundamental ethical principles are always present as guidelines.

RPC ("Fundamental Principles of Professional Conduct").

The appearance of fairness doctrine provides that a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. *See generally State v. Estabrook*, 58 Wn. App. 805, 816, 795 P.2d 151, *review denied*, 115 Wn.2d 1031, 803 P.2d 325 (1990). The trial court has a duty to see that the accused has a fair trial. *State v. Robinson*, 24 Wn.2d 909, 167 P.2d 986 (1946).

The prosecutor is a quasi-judicial officer and is also charged with the duty to insure that the accused has a fair trial. *State v. Jones,* 144 Wn. App. 284, 290, 183 P.3d 307 (2008). A prosecutor, like all lawyers, has

an ethical duty to refrain from representing conflicting interests (RPC 1.7); and should not represent the State in a case where the prosecutor will be a witness. RPC 3.7. The question of whether to disqualify an attorney is reviewed for abuse of discretion. *Pub. Util. Dist. No. 1 (PUD) v. Int'l Ins. Co.*, 124 Wn.2d 789, 812, 881 P.2d 1020 (1994).

In Washington, the county prosecutor's office represents the State in criminal matters; and defends the county in civil suits against the various county agencies, to include the county sheriff's office, the jail, and the prosecutor's office itself. RCW 36.27.020.[12] A conflict of interest may arise when the county prosecutor prosecutes a criminal case that involves county employees who the prosecutor may have to defend in his/her capacity as the lawyer for the county in a civil matter. A conflict may also arise in a criminal case if the prosecutor acquires information that suddenly makes the prosecutor a witness, particularly if the information acquired by the prosecutor makes the prosecutor a likely witness for the defense.

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[12] "The prosecuting attorney shall:

. . .

(2) Be legal adviser to all county and precinct officers and school directors in all matters relating to their official business, and when required draw up all instruments of an official nature for the use of said officers;

(3) Appear for and represent the state, county, and all school districts subject to the supervisory control and direction of the attorney general in all criminal and civil proceedings in which the state or the county or any school district in the county may be a party . . ."

The decision to disqualify DPAs Schnepf and Montgomery was not an abuse of discretion. The DPAs were officers of the court and as such advised the trial court that they were implicated as witnesses and they could no longer ethically proceed with representing the State at trial. RP 11-12 (8/12/11). The DPAs advised that the decision was made after consulting the Kitsap County Prosecuting Attorney and with prudent consideration of the Rules of Professional Conduct. RP 12 (8/12/11).

The trial court asked the DPAs to expand upon the reported conflict so the court could further "entertain the information and get a better understanding." RP 14 (8/12/11). The DPAs advised the court that during recent interviews of law enforcement witnesses, information was disclosed that "implicates law enforcement officials, from Port Orchard to Kitsap County, to the jail, and also implicates our office" and that "the State's prosecutors have now become [both] impeachment witnesses and substantive witnesses." RP 15 (8/12/11).

The disclosure by the two DPAs demonstrated that disqualification was necessary in order to comply with RPC 3.7, avoid possible prejudice to the defendant, and guarantee a trial that appeared fair to a disinterested observer. Continuing the proceedings with Kitsap County representing the State would have required the judge to ignore admissions by officers of the court that they could not ethically proceed as the State's

representatives. Denying the motion and keeping the DPAs on the case would have resulted in trial proceedings that would not appear fair to an outside observer; and further risked waste of judicial resources if the case were reversed for this very reason. The judge elected to insure that McCarthy received a trial that was free of the taint of the conflict of interest reported by the State's lawyers. This cannot be an abuse of discretion.

The decision to disqualify the whole prosecutor's office as opposed to just the two DPAs was immaterial. Disqualification of the two DPAs would still have been a "disqualification of the prosecuting attorney" for purposes of CrR 3.3 and would also reset the commencement date. Had a new deputy prosecutor been assigned the case, he or she would also require additional time to review the discovery and prepare for trial. This would have been "good cause" to continue the trial date within the new time for trial period, as occurred with the substitution of the AGO.

4. A claim of "government mismanagement" was not preserved below; nor does the record support the claim

McCarthy never moved for dismissal on grounds of "government mismanagement." The claim is raised for the first time on appeal and the court should decline review. RAP 2.5(a).

Nor does the record support a claim of "government mismanagement." The State reported on July 28, 2011, that it would be ready for trial on August 23. RP 2 (7/28/11). Between July 28 and August 12, 2011, the DPAs met with their law enforcement witnesses. RP 11-16 (8/12/11). This is a common practice and it would not be typical for a prosecutor to audio or video record a standard pretrial meeting with a law enforcement witness. Nor is it typical for prosecutors to expect that police officers will provide new and troubling information that was not included in their police reports. It is not customary, and normally not necessary, to have a third party present for a prosecutor's simple pretrial meeting with a law enforcement witness.

More importantly, there is no evidence that the two DPAs had any reason to believe that the police officers would divulge information that would affect the prosecutors' ability to represent the State. The prosecutors immediately reported the conflict to the court and counsel when it was discovered. Kitsap County immediately arranged for the AGO to prosecute the case and McCarthy was tried 60 days later. There was nothing more the prosecutors could do. The record does not support a claim of government mismanagement.

5. The trial court appropriately continued the trial within the time for trial period upon a finding of good cause

The trial court has the discretion to continue the trial on motion of a party for good cause shown. *State v. Woods*, 143 Wn.2d. 561, 579, 23 P.3d 1046 (2001). A trial court's ruling on a motion to continue the trial is reviewed for abuse of discretion. *Id.* A continuance for good cause is excluded from the time for trial computation. CrR 3.3(e)(3).

Here, after the time for trial was reset to expire on October 11, 2011, the trial court could continue the trial up to and until October 11 without violating time for trial. McCarthy does not appear to dispute that the good cause to continue the trial due to the new prosecutor's need to prepare. Nor does McCarthy challenge the additional one-week extension of time to accommodate Tammy Carey's prescheduled vacation, which was excluded from the time for trial period. CrR 3.3(e)(3) and (f)(2). The continuance that was granted was appropriate.

E. The Trial Court Properly Allowed Evidence Of The Defendant's Prior Bad Acts For The Limited Purposes Of (1) Proving Carey's Reasonable Fear Of The Defendant, And (2) Explaining Carey's Delay In Reporting The Crimes To The Police

ER 404(b) provides:

> ***Other Crimes, Wrongs, or Acts.*** Evidence of other crimes, wrongs, or acts is not admissible to prove the

> character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident.

ER 404(b). The list of "other purposes" for admitting evidence of a defendant's prior misconduct is not exclusive. *State v. Grant*, 83 Wn. App. 98, 105, 920 P.2d 609 (1996). Prior physical abuse of the victim is relevant under ER 404(b) to prove the victim's reasonable fear of the defendant. *State v. Magers,* 164 Wn.2d 174, 183, 189 P.3d 126 (2008). Similarly, prior physical abuse of the victim is relevant to explain the victim's delay in reporting abuse. *State v. Wilson*, 60 Wn. App. 887, 890, 808 P.2d 754, *review denied*, 117 Wn.2d 1010 (1991).

1. McCarthy's prior physical abuse of Carey was properly admitted to prove the essential element in Count II that Carey experienced reasonable fear of McCarthy

The State is required to prove each and every element of the charged crime beyond a reasonable doubt. RCW 10.58.020. An essential element of Count II was that the victim was placed in reasonable fear of injury. Washington Pattern Instructions Criminal (WPIC) 35.50.[13]

[13] "Assault" is not defined in the RCW. WPIC 35.50 provides that an assault is committed where the assailant commits an act intended to cause fear of injury, and "which in fact creates in another a reasonable apprehension and imminent fear of bodily injury." WPIC 35.50 has repeatedly been approved as an accurate statement of the law. *E.g., State v. Krup,* 36 Wn.App. 454, 676 P.2d 507 (1984).

McCarthy argues that "the reasonableness of Carey's fear . . . was not contested by the defense" and therefore there was no cause for the State to introduce evidence of Carey's fear.[14] McCarthy ignores his own plea of "not guilty" and the accompanying jury instruction that forced the State to produce evidence beyond a reasonable doubt. CP 74-98 (Instruction No. 4). This same instruction also reminded the jury that McCarthy was "presumed innocent" until the State overcame its burden of proof beyond a reasonable doubt. CP 74-98 (Instruction No. 4).

The State's heavy burden existed regardless of whether or not McCarthy chose to focus his efforts on disputing that element. The State's burden was to produce evidence that Carey experience reasonable fear of McCarthy. The State's evidence to prove this essential element was Carey's past history with McCarthy.

All of McCarthy's acts of prior physical abuse of Carey were relevant to prove her reasonable fear. The State elected to offer only some of McCarthy's prior bad behavior towards Carey. CP 272-282. The trial court admitted the evidence only after weighing its probative value against the danger of unfair prejudice to McCarthy. CP 246-49.

McCarthy concedes that the trial court identified valid purposes for admitting the evidence under ER 404(b), but argues that the trial court

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[14] *Appellant's Opening Brief* at 38-39.

"failed to find the evidence relevant" and "did not address prejudice or probative value."[15] Contrary to McCarthy's argument, the trial court explicitly found that "the following evidence *is relevant* to prove an identifiable purpose permitted by ER 404(b)," and thereafter cited all of the evidence it was admitting for this purpose. CP 246-49 (emphasis added). The trial court further explained why each piece of evidence was "relevant to prove" it's identified purpose. CP 246-49.

McCarthy's argument that the trial court did not engage in the required balancing test is also contradicted by the record. The trial court explicitly ruled, "The court *has balanced the probative value of the following evidence against the danger of unfair prejudice* and finds that the probative value outweighs the danger of unfair prejudice given the evidence and issues presented to the jury." CP 246-49 (emphasis added).

Refuted by the plain language of the court's written order, McCarthy suggests that the trial court's written order is somehow not really "the court's order" because it may have been drafted by counsel.[16] The court adopted and signed the order as its own, regardless of who drafted it. A trial court's final written order prevails over any inconsistencies with the court's oral ruling. *State v. Skuza,* 156 Wn. App. 886, 898, 235 P.3d 842 (2010).

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[15] *Appellant's Opening Brief* at 38.
[16] *Appellant's Opening Brief* at 38.

2. Evidence of McCarthy's prior bad acts were relevant and admissible to explain why Carey's delay in reporting the crimes to the police

McCarthy argues that Carey's delayed reporting could be explained without reference to prior bad acts. McCarthy does not explain how this would have been possible. One undisputed fact of the case was that Carey waited four months to report the charged crimes to the police. The State had to explain to the jury why Carey waited four months to notify police in order to satisfy its burden of proof.

Carey testified that she did not report the assaults to police because she was afraid of McCarthy and feared for her dog Ginger; and feared that the police would favor McCarthy if she reported. The trial court properly admitted evidence of McCarthy's prior acts of violence against Carey and her pets to explain why she had this fear. CP 246-49.

3. McCarthy declined a limiting instruction and thereby waived any claim of error

There is no affirmative duty on the part of the trial court to give a limiting instruction *sua sponte*. *State v. Russell*, 171 Wn.2d 118, 123, 249 P.3d 604 (2011). Courts presume that trial counsel's decision not to request a limiting instruction was a tactical decision made to avoid re-emphasizing unfavorable evidence. *State v. Barragan,* 102 Wn. App. 754, 762, 9 P.3d 942 (2000). A party that fails to request a limiting

instruction waives any argument on appeal that the instruction should have been given. *State v. Stein*, 140 Wn. App. 43, 70, 165 P.3d 16 (2007).

McCarthy's argument that the court should have given a limiting instruction *sua sponte* ignores the fact that McCarthy was aware that he was entitled to a limiting instruction; that the court offered to give a limiting instruction; and McCarthy specifically declined the instruction.

The State advised the court and counsel in writing that it had no objection to a jury instruction limiting the jury's consideration of the evidence admitted under ER 404(b). CP 272-82. The State verbally acknowledged to McCarthy and the court that McCarthy was entitled to a limiting instruction if he wanted one. RP 36-37. The trial court, recognizing that McCarthy might not want a limiting instruction for strategic reasons or might want to craft specific language for the instruction, ruled that "[a] limiting instruction will be given, if requested and appropriate." RP 37. The trial court invited McCarthy to submit a proposed limiting instruction. RP 37.

McCarthy and his counsel were acutely aware that they were entitled to a limiting instruction—if they wanted it. It was reasonable for McCarthy to decline the instruction in order to avoid reminding the jury of McCarthy's prior bad acts. The law presumes that McCarthy purposefully declined a limiting instruction for tactical reasons.

State v. Barragan, supra. It was not error for the court to decline to give one *sua sponte*. *State v. Russell, supra.*

F. The Trial Court Properly Admitted Certain Out-Of-Court Statements Of Victim Tammy Carey Because They Were Prior Consistent Statements Under ER 801(d)(1)(ii)

The trial court's decision to admit or exclude evidence will not be reversed on appeal absent an abuse of discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). A trial court abuses its discretion if no reasonable person would adopt the view of the trial court. *Id.*

When a witness' credibility is attacked on cross-examination, "[t]he fact that the witness told the same story before is relevant to the witness's credibility [because] it rebuts the alleged fabrication under pressure." *State v. Perez*, 137 Wn.2d 97, 107, 151 P.3d 249 (2007). The standard for admission of a prior consistent statement under ER 801(d)(1)(ii)[17] is whether the cross-examination of the witness raised an inference that was sufficient to allow opposing counsel to argue that the witness had a reason to fabricate her story later. *State v. Makela*, 66

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[17] A statement is not hearsay if—

. . .

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . .

Wn. App. 164, 168, 831 P.2d 1109, *review denied*, 120 Wn.2d 1014, 844 P.2d 435 (1992). That inference was readily apparent in the present case.

Tammy Carey testified on direct that McCarthy put a gun to her head and shoved her out of a second floor window. RP 277-293. Carey testified that soon afterwards she related the events to victim advocate Debbie Brockman and talked to Brockman "extensively" about reporting the assaults to police, but she was too afraid. RP 307, 326, 397. Carey testified that she also told her friends Deborah Cardinal and Beverly Sonby what McCarthy did to her. RP 308. These out-of-court conversations occurred prior to trial and prior to Carey's report to police.

Carey was subjected to vigorous cross-examination. RP 333-397. Defense counsel implied that Carey's trial testimony was fabricated by repeatedly confronting Carey with alleged out-of-court statements that Carey told firefighters that she "fell" out of the window as opposed to being pushed out of the window. RP 334-35. A heated confrontation occurred between Carey and defense counsel as Carey repeatedly denied that she made such statements to the firefighters. RP 334-35. Defense counsel confronted Carey about her description of flying out of the window. RP 350-52, 373-376. Defense counsel implied that Carey's trial description of flying out of the window was fabricated and he told Carey that she had never given that description before. RP 350-52,

373-76. Defense counsel sarcastically responded, "Really?" when Cary insisted that she had given the same version of events prior to trial. RP 351. Carey told defense counsel that she gave Debbie Brockman, Deborah Cardinal and others the same description of events prior to trial. RP 352, 375. Defense counsel retorted, "Okay. We will get a chance to speak with them," implying to the jury that Carey's trial testimony was a lie and these witnesses would not corroborate her testimony. RP 352.

Defense counsel further implied that Carey's trial testimony was fabricated by confronting Carey with alleged statements to doctors at the hospital that she "jumped out of the window." RP 352. Carey denied that she told doctors she "jumped" out of the window. RP 352.

Defense counsel also implied through his cross-examination that Carey fabricated her testimony that she initially declined to report McCarthy to the police because she was afraid of him and feared for the safety of her dog Ginger. RP 354-57, 372.

The State attempted to rehabilitate Carey by offering prior out-of-court statements that were consistent with her challenged trial testimony. Deborah Cardinal testified over McCarthy's hearsay objections that Carey told her how she suffered her injuries; that Carey told her that McCarthy put a gun to her head and shoved her out of a window; that she landed on her feet; and she was too afraid to report the assaults to police.

RP 516-18. Dick Wittsock testified over McCarthy's hearsay objection that Carey told him that McCarthy pushed her out of a window. RP 536. Beverly Sonby testified over McCarthy's hearsay objection that Carey told her that McCarthy put a gun to her head and then shoved her out of a window. RP 897-98.

The trial court was well within its discretion to overrule objections to Carey's prior consistent statements to Cardinal, Sonby, and Wittsock in light of defense counsel's cross-examination of Carey. The trial court was uniquely situated to assess defense counsel's cross-examination in context, to include inflections in his voice and sarcasm. Even the cold transcript available for this court's review reflects that trial counsel's cross-examination of Carey was acrimonious and implied that Carey's description of the assaults at trial was a lie. Prior consistent statements were admissible thereafter to rebut this assertion.

McCarthy curiously argues that it was the State's burden to identify a motive for Carey to fabricate her prior out-of-court statements, and to then disprove the motive. McCarthy's argument is misguided.

First, a prior consistent statement is admissible "to rebut an express or implied charge against the declarant of recent fabrication ***or*** improper influence ***or*** motive." ER 801(d)(1)(ii) (emphasis added). Use of the disjunctive in the rule means that if the opposing party implicitly

charges the declarant with recent fabrication, there is no need for the court to address "motive to fabricate." In the present case McCarthy implied "recent fabrication," not "improper motive."

Second, the "motive to fabricate" issue arises only when the opposing party alleges that the witness had motive to lie during her trial testimony. *See generally State v. Makela,* 66 Wn. App. 164, 831 P.2d 1109 (1992). Thereafter, it becomes the State's duty to show the court that the alleged motive to fabricate was not present at the time of the prior out-of-court statement. *Id.* Here, McCarthy never alleged a motive for Carey to fabricate her trial testimony. To the contrary, McCarthy's counsel told the jury in closing, "I don't know why Tammy Carey would come to court and say something that's not true." RP 1278.

Finally, case law provides that opposing counsel's mere assertion that a witness had a motive to lie at the time of the out-of-court statement is insufficient to bar the admission of the statement:

> The mere assertion that motives to lie may have existed at the time of the prior statement is insufficient to prevent their admission. The trial court must decide, as a threshold matter, whether the proffered motive evidence rises to the level necessary to exclude the prior consistent statement. Here, the trial court ruled that it did not and we agree. If the trial court were prohibited from making such a threshold evaluation, there would be little reason for ER 801(d)(1)(ii) to exist. Prior consistent statements would become inadmissible every time the party against whom they were offered proffered a "motive," however baseless, for the declarant to fabricate the statement at the time she made it.

State v. Makela, 66 Wn. App. 164, 173, 831 P.2d 1109 (1992). Implicit in the holding from *Makela* is that the party opposing the admission of the evidence must allege a motive to fabricate. It would be a nonsensical rule if the proponent of evidence had to identify a reason why the offered evidence was not admissible. Otherwise, the prosecutor could simply say, "there are no motives to fabricate," and the issue would be settled.

In this case, McCarthy's objection was "hearsay." When the State responded that the statements were admissible as prior consistent statements, it was incumbent upon McCarthy, not the State, to point out a "motive to fabricate" that would remove the statement from the non-hearsay category of prior consistent statement. McCarthy never did so because there was no apparent motive to fabricate, which he admitted during his counsel's closing argument. RP 1278.

G. McCarthy's Convictions Should Be Affirmed Because He Received Adequate Assistance Of Counsel

A claim of ineffective assistance of counsel requires the defendant to show (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable possibility that, but for the deficient conduct, the outcome of the trial would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). There is

a strong presumption that counsel's representation was not deficient. *Id.* at 131.

1. Counsel's decision not to object to every out-of-court statement by Carey was not deficient performance

An ineffective assistance of counsel claim based on lack of a challenge to the admission of evidence requires the defendant to show (1) the absence of a legitimate strategic or tactical reason to support the challenged conduct, (2) an objection to the evidence likely would have been sustained, and (3) the trial's result would have differed without the evidence. *State v. Saunders*, 91 Wn.2d 575, 578, 958 P.2d 364 (1998).

Here, Carey's out-of-court statements to Brockman, Cardinal, and Sonby were consistent with her trial testimony, which was vigorously attacked on cross-examination as a recent fabrication. "Hearsay" objections would have been overruled because the statements were admissible as prior consistent statements, as discussed earlier. There was no deficient performance.

2. Trial counsel's decision to decline a limiting instruction was a legitimate trial tactic

"Hearsay" is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). If hearsay is admitted for a purpose other than the truth of the matter asserted, the opposing party may be entitled to a limiting instruction. *State v. Athan,* 160 Wn.2d 354, 382-83,

158 P.3d 27 (2007). This primarily applies to the "exceptions" to the hearsay rule set forth in ER 803 and 804.

A prior consistent statement, on the other hand, is not an exception to the hearsay rule; rather, it is simply "not hearsay." ER 801(d). A prior consistent statement is substantive evidence and is admissible for the truth of the matter asserted because it is "not hearsay." *See State v. Harper*, 35 Wn. App. 855, 857, 670 P.2d 296 (1983) (commenting that prior consistent statements were admitted as substantive evidence).

The U.S. Supreme Court has noted that if the requirements for admissibility are satisfied, prior consistent statements are substantive evidence. *United States v. Tome,* 513 U.S. 150, 157, 115 S.Ct. 696, 130 L. Ed.2d 754 (1995) (interpreting federal rule counterpart). In *United States v. Beltran,* 165 F.3d 1266, 1270 (1999), the 9th Circuit held that it was in fact *error* to instruct the jury that consistent statements were limited to witness' credibility:

> The court notes that the limiting instruction given by the district court is incorrect on the law. Normally when prior consistent statements are admitted, the admission is not for the limited use of determining credibility, but may be used as substantive evidence.

United States v. Beltran, 165 F.3d 1266, 1270 (1999).

McCarthy's argument that a prior consistent statement is not substantive evidence is wrong. Accordingly, counsel's performance was

not deficient for declining to request a limiting instruction that would have been a misstatement of the law.

Finally, it is presumed that trial counsel's decision not to request a limiting instruction was made for tactical reasons. *State v. Barragan,* 102 Wn. App. at 762. Here, a limiting instruction could remind the jury that Carey's version of events was consistent. This evidence hurt McCarthy's central argument that Carey was not a credible witness. It was legitimate trial strategy to forego a limiting instruction.

H. The Trial Court Properly Denied The Motion For Mistrial Because The Irregularity That Occurred Was Immediately Cured

The accused, even in a capital case, is entitled to a fair trial, not a perfect one. *State v. Cecil Emile Davis*, ____ Wn.2d ____ (No. 80209-2) (Sept. 20, 2012). Accordingly, a trial court's decision to deny a motion for mistrial is reviewed for abuse of discretion. *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). To determine whether a trial irregularity warrants a new trial, the court consider three factors: (1) the seriousness of the irregularity, (2) whether the testimony was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to the jury to disregard the remark or the testimony. *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987) (citing *State v. Weber*, 99 Wn.2d 158, 165–66, 659 P.2d 1102 (1983)).

Here, Carey was asked on direct examination whether she had any reason to believe that McCarthy knew she was planning to leave him at the time of the assaults. RP 248. Carey answered the question, but then added "[and] other things I'm not allowed to talk about." RP 248. Defense counsel immediately objected and moved to strike the response. RP 248. The trial court struck the answer. RP 248. The jury had been instructed prior to Carey's testimony that it must not consider evidence the court instructed it to disregard. RP 61-62. The jury was later instructed, "You *will* disregard any evidence . . . that was stricken by the court." CP 74-98 (Instruction No. 1) (emphasis added). The jury is presumed to have followed the court's instruction to disregard the brief comment. *State v. Russell*, 125 Wn.2d 24, 84–85, 882 P.2d 747 (1994).

Carey's comment was improper, but the irregularity was not serious. The jury heard hours and hours of testimony from both Carey and McCarthy about both of their wrongdoings. Carey's comment about "other things" was in response to a question about whether McCarthy knew she was moving out. The comment was a passing moment during Carey's lengthy testimony; and one moment in a trial that involved the testimony of 38 witnesses over the course of several weeks.

The trial judge, who was present to hear the comment and assess its effect on the jury in context, thoughtfully explained why McCarthy

could receive a fair trial despite the comment. RP 264-65. The irregularity was not serious and was immediately cured by the court's corrective actions. The trial court did not abuse its discretion by denying the motion for mistrial.

I. The Trial Court Properly Calculated McCarthy's Offender Score And Imposed A Standard Range Sentence

1. Offender scoring

Whenever a person is sentenced for two or more current offenses, the sentence range for each current offense is determined by scoring all current offenses as if they were prior convictions. RCW 9.94A.589(1)(a). However, if two current offenses constitute the "same criminal conduct," the two offenses are not scored as prior convictions. *Id.* The phrase "same criminal conduct" is construed narrowly. *State v. Grantham,* 84 Wn. App. 854, 858, 932 P.2d 657 (1997).

Two offenses constitute "same criminal conduct" only if the two offenses:

> (1) require the same criminal intent;
> (2) are committed at the same time and place; and
> (3) involve the same victim.

RCW 9.94A.589(1)(a). The absence of any one of the three elements precludes a finding of "same criminal conduct." *Id.* A sentencing court's

ruling on this issue will be reversed only upon an abuse of discretion. *Grantham* at 857.

To determine if two crimes share a criminal intent, the court focuses on whether the defendant's intent, viewed objectively, changed from one crime to the next. *Grantham* at 858. The court also considers whether one crime furthered the other such that the defendant had to commit one crime in order to accomplish the other. *Id.* The fact that multiple crimes occur sequentially or close in time does not mean that the crimes shared the same criminal intent. *Id.*

In *Grantham,* the defendant forcibly raped his victim. *Grantham* at 856. After the rape was completed, the defendant stopped, threatened the victim, told the victim to turn around, and raped her again. *Id.* The court held that although the crimes happened at the same time and place and against the same victim, they were separate criminal intent and conduct because "Grantham, upon completing the act of [rape], had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." *Id.* at 859.

In *State v. Lopez*, 142 Wn. App. 341, 352, 174 P.3d 1216 (2007), the defendant repeatedly struck his wife and ruptured her eardrum in an effort to obtain information from her. *State v. Lopez*, 142 Wn. App. 341, 352, 174 P.3d 1216 (2007). The victim broke free from the defendant

and fled to a different room. *Id.* The defendant caught the victim, held a knife to her throat, and threatened to kill her. *Id.* The court held that the *mens rea* for the two assaults (beating vs. threatening with knife) was different because the defendant's original intent was to beat his wife to obtain information from her; but the intent changed to causing her reasonable fear that she would be stabbed with the knife. *Id.* at 352-53.

Here, the assaults against Carey occurred at the same time and place and involved the same victim. Like *Grantham* and *Lopez*, however, McCarthy's objective criminal intent changed from one crime to the next. Like *Lopez,* McCarthy initially intended to cause his victim to fear for her life by putting a weapon to her head but, like *Lopez*, she broke free. Like *Grantham,* McCarthy "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." McCarthy chose the latter, changing and forming the intent to cause Carey great bodily harm. The trial court's finding of separate criminal conduct was correct and the sentence should be affirmed.

2. Aggravating Factors/Exceptional Sentence

McCarthy argues that he received an exceptional sentence that was not supported by a jury finding of an aggravating fact. However, this argument is predicated on establishing an erroneous finding of "same criminal conduct." McCarthy received a standard range sentence if the

finding of "same criminal conduct" was correct. If the court disagrees, the State concedes that McCarthy must be resentenced.

IV. CONCLUSION

McCarthy received a fair trial and a standard range sentence. The judgment and sentence should be affirmed.

RESPECTFULLY SUBMITTED this 22nd day of October, 2012.

ROBERT M. MCKENNA
Attorney General

By: _____
JOHN HILLMAN, WSBA #25071
Assistant Attorney General

Appendix A

STATE OF WASHINGTON	)	
Plaintiff	)	No: 10-1-00940-8
v.	)	
DENNIS MCCARTHY	)	
Defendant.	)	

REDACTED INTERVIEW
Of Dennis McCarthy
Conducted by Tammy Carey
On March 21, 2010

Jane Wilkinson, Transcriptionist
Flygare & Associates, Inc.
1715 South 324th Place, Suite 250
Federal Way, WA 98003

(AUDIO BEGINS)

* * * * *

MS. CARRY: Today is March 21, 2010. It's the afternoon. Sunday. This is Tammy Carey talking, and Dennis McCarthy will be talking.

BY MS. CAREY:

Q. Are you talking of your own free will, Dennis?

A. Yes.

Q. Are you of sound mind?

A. Yes. I'm of --

Q. No drugs? No alcohol?

A. No. I don't drink. I don't take any drugs. I'm fine.

Q. Are you being coerced? Have I --

A. No, of course not. I asked you to do this.

Q. Have I promised you anything --

A. No, no.

Q. -- or threatened you or in any manner?

A. No. This is a part of our healing.

Q. So why are you doing this?

A. Well, let me begin by saying that, you know, we got -- we have known each other all our lives and our families have known each other all our lives. We got together. And I had a bad alcohol problem, and you came in and tried to help me. And then my son came home from the Marine Corps and totally

disrespected you, put you in fear, was trying to get kids in the house. And instead of sticking up for you -- and instead of sticking up for you I stuck up for him. I was drinking and I did a lot of stupid things. I called 911 on you one night when you didn't do anything wrong, just because you wanted to talk to me -- we wanted to argue. And then, afterwards, I set fire to your things and then told you I was going to call the police and blame it on you. And then, even after I was arrested for that, I still tried to blame it on you until I finally confessed that I had actually done it. But what's worse, Tammy, is you have stuck up for me and you've been very good to me. And I love you very much, and I'm sorry about the things I did.

In May -- in the May time frame of 2009 I went and got another tape recorder. We were going through some difficult times, but it wasn't because of anything that you had done. It was because my family was treating us very badly. And my son and my mother -- because I had lied to them about, about things that you had done and I never did what I should have done to correct it -- I did, but not enough -- and they were creating problems.

Well, what I did was I went out and I bought a mini digital tape recorder. And on a couple of occasions, I believe over the period of a couple weeks, I would tape you. But what I would do, Tammy, is I would purposely get you

angry. I would get you mad. I would do things to get you upset and then I would start taping it when you were yelling back at me, this was after I had yelled at you, so it made it seem like you were the crazy one. And I realized after Emily died that I had done a terrible thing. I told you about the tapes. I never told anybody else about it. Nobody else has a copy of those --

Q. Dennis, you're giving your rendition and this is not what we spoke about. You're giving something here -- okay, let's start from the beginning. Let's start literally from the beginning. You and I spoke the other day; yes or no?

A. Yes.

Q. Okay. And we wanted to tape record everything that you said the other day?

A. Yes.

Q. Okay. You have systematically, from the time we got together, did you or did you not portray me as crazy and lie to your friends, to Marti, you know, the guys at work, about me breaking your computer and all sorts of lies; yes or no?

A. Well, yes, I did. And I told you that.

Q. Okay, but, you know, I had asked you one question and you're, like, going on into this other thing --

A. I'm sorry --

Q. -- and I want to discuss what you said you were willing to tape the other day. Yes or no?

A. Yes.
Q. Okay. I -- all the truths that you had told me and things I have found out, I mean -- you sat here -- I mean, I just wish, instead of what you seem to have rehearsed in your head, that you would just discuss, like we did the other day, how you destroyed all credibility for me with the police from the get-go.
A. Okay. I can go start from the beginning and get a little bit deeper. Yes. What I had talked about the other day with you was that after I got arrested I was out of the house about six weeks and during that time --
Q. I'm sorry. I'm really sorry, Dennis. I don't mean to interrupt you --
A. And during that time -- let me finish.
Q. But we're talking about before then, Dennis. Okay? There is a lot involved here. So you're going on to November 3rd. So you have everything pre-rehearsed in your head instead of sitting here and answering questions that I'm giving to you.
A. Okay. I'll just answer the questions you give to me. Will that be easier? Will that be better? Rather than me trying to --
Q. Yeah, yeah --
A. -- okay, okay, let's do it that way --
Q. -- yeah, it's not so sugarcoated. Yeah.
A. I'm not trying to sugarcoat it. I want to be as accurate as

possible. So I'll just let you ask me the questions and I'll answer.

Q. Did you destroy all credibility -- I'm talking about from right after, after we first got together, like a month afterwards, when you were sitting there -- actually, the first time you called 911 -- were you systematically bad-mouthing me, lying about me to your friends and to other police officers?

A. Yes.

Q. What were you telling them? What were you lying about?

A. Well, I was telling them about the problems that we had; that you would hit me, that you broke my computer, that you were crazy. You know, and I said this to a lot -- to my friends. And then, when my son was giving problems, I was drunk that night and sent out that stupid e-mail, "No one gets between me and my Marine," because my son's in the Marine Corps. And really all you were trying to do was help me, and I was disrespecting you.

Q. You were doing more than disrespecting me, Dennis. You were setting me up from the beginning.

A. Yes, I -- yes, I was.

Q. When you sat there were you lying about this to your friends when you were telling them I was crazy, hitting you, the computer, all this stuff?

A. Well, yes, I was. I was lying to them. And that's what I

just said, that I was lying to them.

Q. When you called 911 that night, October 23rd, on me, why did you call 911 on me?

A. We were talking. You wanted to talk and I didn't want to talk. And I was stupid. I was very foolish and I called 911. The deputies showed up. You had done nothing wrong. And I just told them I wanted to go to work, even though it was several hours early for me because I'm not on duty until 9:00. I think it wasn't even 7:00 yet and I just went in at 7:00. And then -- but before I went in I went to Commander Marti's house and told them those things that I said that I had lied about.

Q. What things?

A. That you were crazy, mean, broke my computer.

Q. And at that time did Commander Marti give you a tape recorder for work or, as you had told me on November 2nd, the tape recorder to record me?

A. I told you that Commander Marti gave me a tape recorder to record you. But the truth of the matter is he gave me a tape recorder -- it was just a coincidence. He gave a tape recorder to everybody in the department to use on duty. It was a little digital tape recorder. And then I brought it home and told you that he gave it to me to use on you, which was false. He actually gave one to everybody.

Q. Dennis, why did you sit bad-mouthing me in the beginning and

ruining all my credibility beforehand? Because -- and during that time you used to say to me, "I'm going to leave this house and you're going to burn it down." And I used to look at you and I used to cry and say, "How could you say I would ever do something like that?"

A. I guess it's because, instead of confronting my son and instead of confronting the other problems, it was easier to turn against you and turn on you. It's a --

Q. And do what to me?

A. What we just said; treat you badly, lie about you, tell everybody you're crazy, betray you.

Q. I'm sorry, you're just -- you're throwing me off right now, Dennis. Why would you set me up as a crazy person and then on November 2nd -- and tell everybody I'm going to burn your house down and tell them all sorts of lies about me, and then on November 2nd you actually set a fire and sat there saying you were going to have me arrested for it. Which everybody knows this.

A. I know that.

Q. You were setting me up, yes or no, Dennis?

A. Yes. And I told you that. It was a very bad thing to do. And I repented of that. I'm very sorry about that.

Q. As a woman -- and this has nothing to do with the tape -- you set me up because you didn't want me anymore. So it was easier just to get rid of me but have me arrested and you

look like the good guy; yes or no?
A. Yes. At that time. That's the way I felt then, but I don't feel that way now.
Q. On October 23rd when you called the police because you didn't want to talk about things, was there one officer in particular that was from the old boys club and that wanted to arrest me even though at that point you realized how serious your actions were by calling 911 and the police hear that I was about to get arrested?
A. Yes.
Q. What was his name?
A. Do you -- if you know his name could you remind me?
Q. I don't. He was from the sheriff's department?
A. Yes, he was a deputy from the sheriff's department. If I heard his name --
Q. A deputy or a sergeant?
A. He was a deputy. There wasn't a sergeant out there then.
Q. It was an older gentlemen, though, I remember.
A. No, I think he was younger. And what he was saying to me was I -- I can't remember his name. Anyway. What he was saying to me was that, well, if you try to restrain me or prevent me from leaving the house then he should arrest you. And I said no, that you didn't. And I never said you tried to restrain me. But he kept saying, "Well, was she restraining you?" And I was like, "No, she just wanted to

talk and I don't want to talk." So then in his report I guess he wrote -- I saw the report later on because my attorney got a copy of it -- where he said that I denied you tried to do it when I never -- there was nothing to deny. I just said you didn't do it.

Q. And that night during duty you came home to find me packing my stuff?

A. I think I did stop at home and you were packing, yes.

Q. For the next week, when we argued or if I didn't do anything right, what would you say to me, Dennis?

A. I threatened to call the police a few times.

Q. And reminded me of?

A. Yes.

Q. What yes?

A. Oh, what I did. Called the police the other night.

Q. And that who had the power?

A. I guess I was trying to show you that I did.

Q. No, you told me. You weren't trying to show me --

A. Yeah --

Q. You kept telling me, Dennis.

A. Yeah. I understand. Yes, I did.

Q. You went into Marti's office after that 911 call -- or his home -- you spoke to Marti your commander, lied to him; yes or no?

A. Yes.

Q. And then you lied to me about the report?
A. Yes.
Q. And you told me there was no report?
A. Yes.
Q. Meanwhile you knew there was?
A. Well, the first time when I went in there I didn't see it because it was hidden. But I tried to do a search on it. And then I found out later on that there was.
Q. You told me you called Steve Sipple and asked permission that night to get into the report?
A. Correct.
Q. And Steve Sipple gave you permission to go in for that report?
A. His exact words were -- both our agencies share I/Leads, which is the police reporting network that was shared by several agencies including Port Orchard police and Kitsap county sheriff -- and said, "You have access to I/Leads. Go ahead."
Q. So you knew there was a report. Just because you could not access it, you knew there was a report?
A. That is correct. That is correct. I knew there was a report there but I couldn't access it. And when I tried that's when the county sent down that letter to the police department that I was trying to access the report.
Q. Now, isn't it a well-known fact that a police officer cannot

get a report about himself, a 911 phone call, he's not supposed to access it?

A. I don't know that that -- that's not any policy that I'm aware of that's in writing. Normally if you're going to -- if you're from one agency -- even though we share the same reporting system, if you want a copy or you want to view a report from another agency you normally contact that agency to get permission. And that's what I did.

Q. Why were you able to get permission from a sergeant but yet, when I put in public disclosure, I wasn't allowed?

A. Well --

Q. You got permission from a sergeant from Bremerton police?

A. No, from the Kitsap county sheriff.

Q. I apologize.

A. Well, because you're a citizen. I have access to the police -- I have access to the police system anyway. And before any agency releases a police report to a normal citizen there might be information they need to redact.

Q. Okay. So then what were you going to get in trouble for? You said that -- because trying to access that report?

A. Right.

Q. Why were you going to get in trouble?

A. Well, the allegation that county sent down was that I was trying to access the report for my own personal use.

Q. Elaborate, please.

A. Well --
Q. To me all it's sounding like is you were not allowed to access the report and knew and Steve knew -- Steve Sipple and you both knew that you were not allowed --
A. -- okay, there is no specific policy about that. However you have to have a law enforcement reason to access a police report. And I did not have a law enforcement reason other than I was curious.
Q. And did you tell Steve Sipple this?
A. No. I just asked him if I could access the report, take a look at it.
Q. Steve Sipple is president of a motorcycle club?
A. Right.
Q. Renegade Pigs; yes or no?
A. Yes. He's president of the chapter, not of the whole club. Of the local chapter that I used to be a member of. I am no longer a member.
Q. Okay, and you were very good friends with him?
A. Yes.
Q. So as your friend he allowed you to access this report or not?
A. Well, we were friends, and I asked him if I could access the report and he said yes.
Q. Knowing it was about you --
A. Yes.

Q. -- and there was no police reason for you to be in there?
A. Correct. That would be a logical assumption.
Q. Well, if he just asked the question or if you just told him. But you did tell him there was an incident at the house. What did you tell him?
A. Well, I told him that night that there was an incident at the house and that the deputies had gone out, you know. And, you know, the same thing I told Marti. You know, I blew it all out of proportion, that you were acting all crazy and all that when you just wanted to talk. And then I think it was the next day I asked him if I could take a look at the report when I really didn't have a specific law enforcement reason to do so.
Q. And you lied to me all that week telling me there was no report?
A. Yes.
Q. When November 3rd, 1st, and 2nd came along and you lit the fire -- you lit the fire, you beat me, you put the hole through the door, you broke the -- you just did so much. Wrote on the walls. I mean, there was -- yes or no, Dennis, I mean --
A. Yeah, I-- I'm going to tell you -- you're not going to like me hearing this. I don't remember beating you but I remember yelling at you, throwing things, burning your stuff, punching holes in the door, writing on the walls.

Basically acting totally berserk.

Q. You don't remember anything with that exercise machine?

A. No, I don't. But I was very, very drunk that night. Very drunk.

I remember the next day -- or a couple of days later when I came by with a deputy, went to get my thing or -- I don't remember. It was sometime -- maybe it was that night when the deputies were here you said something about you fell. But I think that you said you were saying that to cover up for what I did. But I don't remember hitting you. I honestly don't. But that doesn't mean that I didn't do a bunch of terrible things that night; threatening you, burning your stuff, breaking things, smashing pictures, stepping on them, throwing things, writing on the wall, putting my fist through the door, putting you in fear the whole night.

Q. Putting a torch up to me. Threatening me with a torch.

A. Well, I did have the torch when I went upstairs, yes.

Q. And you threatened me with the torch.

A. Well, I threatened to burn your things.

Q. After you threatened me with the torch, Dennis.

A. Okay --

Q. That's all on tape -- that's --

A. -- okay, that's fine. I know I went upstairs with the torch and I scared you with the torch and I said some things I

shouldn't have said. I don't remember exactly how I threatened you but, you're right, I did. I threatened to burn down the house and --

Q. No, first you came to me with the torch -- and this is all on tape that the prosecutor's office has -- asking me how do I feel. Putting it up to me, the torch, you know, "You scared? You scared? How does it feel to be scared?"

A. Okay, you're right. I did that. I do remember. I forgot about that. You're right. I did do that. I'm sorry. It was not in my mind when you were asking me. You refreshed my memory, and yes, I did do that. "How does it feel to be afraid." Yes, I did. I did.

Q. And I threatened to call 911 but I didn't?

A. Right. And I went downstairs and then came up a short time later and yelled and screamed again.

Q. And told me you were going to have -- that I was -- what did you say to me after you found the fire?

A. Oh, I --

Q. The last time you came up.

A. When I found the fire I yelled some profanities at you and that you had started the fire and that you were crazy and I was going to have you arrested for starting the fire.

Q. So that was the second time I was in fear of being arrested?

A. Just that night, yeah. Probably a lot over the week.

Q. Thank you for elaborating that.

So two times the police were here and I risked getting arrested?

A. Yes.

Q. And each of those times you told me I would be the one to be arrested?

A. Right. But the second time I was arrested. And I should have been arrested. They were right for arresting me.

Q. The other day you told me something and it was the first time you were truthful. I knew it all along -- well, from January -- that you used me to get out of the charges. And we can't elaborate too much on that because another tape we're going to make.

A. When I came home -- when I came home after that -- when I came home I did use you, yes. I don't feel that way now.

Q. Or --

A. I have fallen in love with you. It took a long time for me to realize the gravity of my sins. It took a long time going to Ramalia(ph) and the DV counseling, which I wasn't going to go to until you pushed me to go to that, to really understand a lot about power and control and the things that I had done. And I am very, very penitent and very, very sorry, and that's why I'm making this recording. Because I feel that this is part of healing. And as much as it hurts, for both of us, if you can feel better after this then that's all I want. You've done so much for me.

Q. During November your plan was to use me? You were planning on using me to get out of the charges?
A. Well, I'd have to answer yes to that.
Q. And November 3rd and that day forward did you continue to tell people that I was the one that set your fire and destroyed your career?
A. From the time I was arrested I told a lot of people that you destroyed my career and set the fire; including my mother and my family which what's created the problem. However after I came home I did start telling people the truth. Not everybody. But I told the truth to my family, to a lot of my friends, to the Renegade Pigs motorcycle club that I was involved in. I sent that e-mail out. And I told a couple of people in the Port Orchard Police Department, Commander Marti and Sergeant Shuster specifically. Whether the word got around to everybody else, I don't know.
Q. This is what bothers me, Dennis, because you set me up even before November 3rd.
A. Yes.
Q. You discredited me to everybody. That I could never reach out for help. Yes or no?
A. Yes.
Q. And then after all the hell you put me through you used me to get out of charges and then when you came home you continued to use me.

A. Yes.
Q. And your main goal was to prove your innocence and that this woman destroyed your career?
A. Well, after I came home -- that was before I came home. After I came home a lot of people knew that I had set the fire. Because I even said it in open court that I set the fire. But what I did after I came home was I tried to make excuses for it. "Well, I was an alcoholic," which was true. And I was very drunk, and I never would have done it if I hadn't been drinking. But besides the point, I minimized what I did and over exaggerated and maximized what you did. So even though people knew that I had set the fire they were like, "Well, she was just as bad or if not worse than he was." That was the picture I was painting then. I'm not doing that anymore. In fact I'm the opposite now. But that was what I was doing last January, February and probably into March.
Q. And later. You were bad-mouthing me, Dennis, to a lot of people.
A. It stopped -- it really started reducing after I got hired by Lockheed and started working for Fred Harden(ph) and the military because they had to do an extensive background investigation -- I'm going to get my secret clearance -- and review the case reports, and they were able to see everything that happened. And after that I knew that if I

wasn't completely honest I would never get my secret clearance and never be able to retain my job. So that's partially what forced me to stop playing games and to start owning up.

Q. But you continued to play games, Dennis, and you're sugarcoating this. If you decide this tape is going to get you into trouble at the end of the tape then I won't ever use it, okay? But you are sugarcoating things. Please let me say something. You bad-mouthed me to everybody, to Al Townsend and to everybody else. You're telling me in February that you started changing your ways. You did not --

A. No, I said March.

Q. In March --

A. I didn't say --

Q. -- the end of April did you go to the emergency room, Dennis?

A. Yes. I am not saying I changed overnight. I'm just saying that I began to realize that I had to start telling people the truth. And that is why the people that are in my life right now know the truth and the people in my past, such as Al Townsend and the Port Orchard officers, don't know the truth but I don't talk to them anymore because I never made the full corrections.

But in April, yes, we got into an argument in April. I had a tape recorder. I taped you. We got home from the

argument and you went upstairs to take a shower just to get a time-out and to go away. Instead of me letting you take the time-out, I went upstairs, started yelling at you, told you that the relationship was over and that I wanted you out of the house. You then got upset because I'm yelling. And then I turned on the tape recorder as you were getting mad at me instead of letting it drop.

And then the next day I was working in the armory, and there was a lot of smoke from the guns going off, and I was coughing a lot. And I went to the doctor because of my cough. And instead of telling the doctor that I was there just because of the cough I told them that you hit me in the back and my lung had hurt or something like that. And when she checked she found no marks on my back.

Q. Was it true that I hit you?

A. No.

Q. Did you call your attorney?

A. My attorney had -- there was a voicemail message for me about the diversion and, yes, I called her. I tried to call her a lot that day because I was really worried. And when I called my attorney Hillary, Hillary Smith, at the time she was the public defender representing me, we -- there was some talk about how the county was taking over my probation from the diversion services. And then I mentioned to her that we had gotten in an argument the night before and you

had hit me. And her exact words to me was that I was a little bit too old for her to be giving me relationship counseling and that there were those problems and it was obvious that I needed to get out of the relationship. But --

Q. So once again you bad-mouthed me to somebody; yes or no?

A. Yes. Yes. I'm sorry --

Q. Did you lie?

A. Yes.

Q. To Hillary?

A. Yes.

Q. And then you had -- were you setting me up to get arrested? Be honest. We discussed this two days ago on Thursday. Three days ago. Today's Sunday.

A. Well, we discussed what setting up meant. And after we discussed it I would have to honestly say, yes, I was. It's just hard to admit. But, yes, I was. I'm not going to lie. I told you I wanted to be honest.

Q. And if I ever called 911 for help, no matter what was going on, what were you going to do?

A. I was going to play that tape and let them see that you were the crazy one or accuse you of being the crazy one.

Q. The tape of when I was screaming about Emily, my dog?

A. That was another situation. That wasn't the situation in April when I spoke to Hillary. I didn't tape that. The situation when you were screaming about Emily with your dog

was Emily was very, very sick, and I did not realize how sick she was, but she was very sick --

Q. Wait, wait. And you're saying you didn't tape that?

A. I did tape that.

Q. Oh.

A. No, I'm saying the Hollywood Video one -- not Hollywood Video. We went lingerie shopping that day; remember?

Q. Uh-huh.

A. I was taking you lingerie shopping. And it was that day.

Q. That was back in April and then the next day you lied to me --

A. The next day I lied to you and I lied to Hillary Smith my attorney --

Q. I'm sorry. You lied to me about going to the emergency room?

A. Correct.

Q. And then you called your lawyer that day and you lied to her?

A. Yes.

Q. And I found out later that you made a false report stating that I beat you, at the hospital, the VA hospital?

A. Yes.

Q. Was that report false?

A. Yes.

Q. But between that report and then you went out and brought a

tape recorder -- it was a day that I was on pain killers. I had been working nonstop on your daughter's work. I was exhausted. I had a timeline for my VA claim by noon. And I asked you to pick up the medicine for my sick dog; yes or no?

A. Yes. That's exactly correct.

Q. What did you do that day?

A. I refused to. I refused to. And I continued to refuse to even though Emily was very, very sick, until it got to the point where you were in a frenzy because you couldn't go because you were on pain killers --

Q. And my dog was sick.

A. And your dog was sick. And it got to the point where you had raised your voice because you were panicking because --

Q. I was screaming.

A. -- you didn't want Emily to die. And then finally that's the day I told you I had been taping you.

Q. After how long -- was it two hours of you pushing me and pushing me and not going to get the medicine?

A. Probably at least a good hour and a half. And after that I realized what a terrible thing I had been doing. I went and got the medicine and bought you flowers and gave you the tape recorder, actually broke it and gave it to you. And no one else has ever heard that. Only three people have ever heard that tape: You, me, and God.

Q. I've only heard myself screaming that day out of desperation, screaming and yelling at you after an hour and a half, two hours -- to me it was two hours but you're saying hour and a half -- and me screaming and yelling at the top of my lungs and sounding like an absolute lunatic but I was desperate.

A. You were desperate.

Q. If anybody -- Emily was my baby and if anybody's child -- all I got to hear was that little bit, and then -- I didn't even hear it yet. And when I was screaming, "Get Emily's medicine. That's all I need," you turned around and you said, "I've been taping you and I dropped the tapes off at Hillary's."

A. I did say that. But I never did.

Q. And then I turned around and looked at you and said, "This relationship is a lie."

A. You said this relationship was a lie, that you can't believe it, it's been a lie the whole time, and you started crying.

Q. And you let me hear part of that tape. And I said I wanted to hear the whole thing. You grabbed it out of my hand and you broke the tape; yes or no?

A. That is exactly correct. Yes.

Q. And that's when you went to the store?

A. Yes.

Q. Did we wrestle for that tape on that couch that you're

sitting on right now and over there?

A. Well, you were listening to it over here, and then you got up and I grabbed it out of your hand by the door and threw it on the floor to break it. I was very ashamed of that tape.

Q. Were you wrestling me for the tape?

A. Well, I don't know that we were wrestling. I pulled it out of -- you were holding it and I yanked it out of your hand. I don't remember us wrestling. I remember yanking it out of your hand.

Q. You had played part of the tape upstairs after you told me about it. Then when you came downstairs I told you I want to hear that tape. I sat there and I couldn't figure out your tape recorder. And that's when you came at me and wanted the tape recorder. And you were around my hands. And you didn't just yank it out of my hand that day. And I even told you, "You hurt my hand. You hurt my wrist." And then you walked over there -- when you finally got it you threw it down on the floor over there by the front door and it smashed.

A. Yes. I remember pulling it out of your hand, yes. I don't remember wrestling around for it. I pulled it out of your hand, Tammy, and threw it on the floor. Yes, I did.

Q. I kept screaming at you that you hurt my arm; yes or no, Dennis?

A. I honestly don't remember that.
Q. How do you think you could just pull it out of my hand?
A. You --
Q. Remember I put it behind my back -- okay. I don't want to get you into trouble.
A. You were holding it and I just --
Q. I was not letting go of that thing for my life, Dennis, because I wanted to hear that tape. And you fought me for that tape. I wanted to hear what you had been taping.
A. I don't remember that. We were both emotional. If you're saying that's what happened then that's what happened. Okay? You don't lie. You don't exaggerate. I did pull it out of your hand. If I hurt you I'm sorry. I didn't realize then that I had hurt you. I went to the store --
Q. I screamed at you that you hurt me.
A. I don't remember that. I'm sorry.
Q. I wasn't going to let you just pull it. You were coming at me to get it and I put it behind my back and we were wrestling for that tape because I wanted to hear it.
A. I remember you wanted to hear it and you didn't want me to take it away from you and you got mad at me when I broke it.
Q. I also got mad because you hurt my hand. We'll skip this subject, okay?
A. Okay.
Q. We'll skip this subject. So this was in May and you were

setting me up -- I'm sorry, there was something important. Had I been telling you not only since January -- you came home December 19th, and January I was telling you, "You used me just to get the charges dropped." And you used to tell me no. But, yes or no, did you?

A. Yes. I told you that.

Q. Then there were times I would scream at you, "You're taping me. You're taping me. You're setting me up." Did I scream that over the months at you?

A. Yes.

Q. That I was paranoid that you were --

A. Yes.

Q. Then you would actually tell me I was paranoid?

A. Yes.

Q. And I used to say that when you would be in one end of the living room and I would be at the other and you would say, "Don't hit me," and I wouldn't even be near you. Yes or no, Dennis?

A. Yes. Yes.

Q. And there were times you accused me of hitting you and I wasn't even near you?

A. That's correct.

Q. And you were taping me?

A. Yes.

Q. Your main purpose was to clear your name and make me out to

be the crazy person?
A. Yes.
Q. Just the good guy who didn't deserve what happened?
A. Yes.
Q. Thank you.
A. Maybe I was. That's how I was probably thinking about myself. I probably was embarrassed. I wouldn't feel that way now. And I haven't --
Q. Because of all the bad-mouthing you had told the police for all the months about me?
A. Yes.
Q. Thank you. Thank you for finally being honest. I knew it all along.
A. That's the truth. I was embarrassed because of the bad-mouthing. And I never corrected it completely with the Port Orchard police like I did with other people. I work now for the Department of Defense police and they all think you're an angel in my life; which you are, truth be known.
Q. They've met me. They're not going on just what one person is saying.
A. Well, they heard me -- they heard all the good things that I've said about you and then they met you. So they were able to see the good that I had said when they met you. So they all think very highly of you.
Q. And that's what you should have done from the beginning of

this relationship.

A. Yes.

Q. Instead of lying about me and setting me up and then using your power as a police officer against me, Dennis. You had discredited me and talked about me and lied about me --

A. Yes.

Q. -- to everybody. And then when the November incident happened, when you got out -- you came back home, you still discredited me and made me out to be a crazy woman; yes or no?

A. Yes.

Q. And you tried driving me crazy?

A. At times, yes.

Q. And not normal, like, a woman says, oh, he drives me crazy, or a man says she drives me crazy. You were trying to drive me out of my mind to prove that I was a lunatic and that you were the sane one?

A. I don't know that I conscientiously had a plan to drive you crazy, Tammy. But I would set up situations to where you got mad and then tape you. And that would drive anybody crazy.

Q. You also had me second-guessing my own realities?

A. Oh, yes.

Q. Then on June 13th I had called you as you were leaving work?

A. Okay. I remember it. Yes.

Q. I had screamed into the phone somebody had been in the house earlier, where is your gun, somebody's in the house now. Did my voice sound panicked to you, Dennis?

A. It sounded mad and panicked, yes, and I misunderstood that. Because you were asking me where my gun was, that you had been looking for the gun earlier, and I misunderstood that there had been somebody in the house earlier. Regardless, it doesn't matter. I should have reacted much differently.

Q. You called your son on your way home from work. You never called the police. You never called to check on me.

A. I told you I'd be home right away. And I was actually almost home.

Q. It was 15 minutes. If you were -- wait a second. Okay. You called to say -- if you're saying that you were coming home right away then that means that you knew something was wrong.

A. Right. I knew --

Q. So why wouldn't you call the police or --

A. I knew you were upset with me. I did not know that you still thought there was somebody in the house at that moment. I --

Q. So I would be calling you in a total panic, asking where your gun is, totally panicked 10 hours or 8 hours after somebody had been in the house?

A. No. I thought you were upset with me because you couldn't

find a gun. Because, remember, I had told you I had put it in a certain place and I moved it and I didn't tell you I had moved it, and you were upset with me over that. But regardless, even if you thought somebody had been in the house a couple hours before I would still expect you to be upset and nervous about it. And I was on Highway 16 when you called, so I was only about 7 or 8 minutes from the house.

Q. It was 15 minutes before you got home.

A. Okay. Well, I don't remember how long it took.

Q. You came home --

A. When I came home you were on the phone with 911. And that's when I realized that it wasn't something that had happened previously, that it was going on right now.

Q. Because you came home, you walked in the house and you walked around downstairs and I was yelling to you and there was no answer.

A. I couldn't hear you because the radio was playing so loudly.

Q. Okay, I'm just going to leave that one alone. I'm just going to leave it alone.

With all that going on you don't think somebody's going to go crazy?

A. Oh, I would.

Q. You destroyed my credibility, you lied about me, you went out of your way to not say anything good about me to your

chief or to Schuster or to anybody.
A. Initially, no. Towards the end I did start saying good things about you.
Q. To who, Dennis?
A. Like when I went and got my training records from Dale last summer I did. Too little, too late.
Q. November 3rd. After the newspaper came out around the 7th or something like that, what police officers walked up to you telling you that they wrote in the newspaper about me on the blogs in Kitsap Sun?
A. It was Officer Counselman had mentioned to me that his wife wrote something in there. I think she was the one who wrote about the psycho ex-girlfriend.
Q. Is that -- and he was bragging to you about it?
A. He mentioned to me that was his wife. I forget her name.
Q. But how was he saying it? Like, hey --
A. I think he just said it like -- I don't remember his exact words. It was a long time ago and I haven't talked to him in a very long time. He just mentioned to me that it was his wife.
Q. And he knew his wife did this?
A. Yes.
Q. What is the normal practice with officers? They know they can get in trouble, correct, if they write something?
A. No, not necessarily. They still have their 1st Amendment

rights to write something. And if his wife is writing something she has every right to say what she wants. He's not going to get in trouble for it. I'm not saying it's right, but the department's not going to go after him for it.

Q. Right, because it's his wife?

A. Right.

Q. But if it was him the department actually might have had disciplinary action?

A. I would say and then yes.

Q. So officers normally practice having their wives or friends do something?

A. I don't know whether that's normal or not. I can't say yes or no to that. I don't know whether he put his wife up to it or she did it on her own. When he told me that she did it he seemed to indicate that she did it on her own.

Q. He was fully supportive of it?

A. I remember what he said to me was something about that she -- that she wrote it and she never blogs or something -- I don't remember what the hell.

Q. Well, she signed up that day, so she never normally blogs?

A. Right.

Q. And he was supportive of it?

A. The way he told me about it, it would seem that he was supportive, yes.

Q. John Weinzierl?
A. John Weinzierl.
Q. Yes. He's a Tacoma policeman or --
A. Yeah, he's a Tacoma police officer.
Q. After November 3rd I was stuck here with no money, trying to find some place.
A. Uh-huh, yes.
Q. And you were complaining to everybody how you needed to get back into the house. And everybody felt sorry for you because you were bad-mouthing me to everybody.
A. Right.
Q. And everybody thought I set the fire and you got falsely arrested?
A. Yeah. At that time, yes.
Q. And you bad-mouthed me to everybody?
A. At that time, yes.
Q. Weinzierl and his wife -- John Weinzierl and his wife -- I forgot her name, too, right now.
A. I know I'm -- John Weinzierl and his wife.
Q. Have a friend also by the same name as me, ironically?
A. Tammy Carey, yep.
Q. They were bad-mouthing me?
A. Well, his wife was. His wife Katrina.
Q. Katrina. Well, you told me John had been, too.
A. Well, John was at work that night. And when Katrina was

with -- John was at work that night when Katrina was with the other Tammy Carey.

Q. How do you know what time the phone call came in?

A. Tammy Carey called me -- not you, the other Tammy Carey. I was staying with my friend Dave Loughlin(ph) at the time because there was a no-contact order by the judge. Tammy Carey from Puyallup -- not you, the other Tammy Carey -- called me, I think it was around 11:00 p.m. one night, all drunk telling me about how she had heard what happened from Katrina, John's wife, John Weinzierl's wife, and that she called the house and told you off and threatened you and made comments to you. And I asked her, "Why the hell did you do that?"

Q. Only because you were scared it was going to get you into trouble. Let's be honest.

A. Yes.

Q. Thank you. What time does John work from until?

A. John was working swing shift at that time but he frequently works overtime. He usually got off work 10:00 or 11:00.

Q. 10:00 or 11:00?

A. Yeah. Probably home a little bit after that.

Q. The first of my phone calls started a little after 10:00.

A. Well, Tammy Puyallup called me -- I don't remember the exact time. She called me sometime around 11:00 p.m. to tell me that she had just called you. And she was not with Katrina,

John's wife, at the time. She was home. So she must have called you and gone home, or, after talking to Katrina, went home and called you from her house and then called me.

Q. Well, I know originally she called from their house.

A. Okay. I don't know. I don't know.

Q. She called --

A. -- all I know is that she called --

Q. -- threatening my life, threatening me. She was wasted. I never met this woman, never even knew of her. I didn't know who this was and I was terrified here. Along with Sergeant Steve Sipple of Kitsap County Sheriff's -- and what did he call and tell you one night?

A. I hadn't heard from you for a while and I was telling Steve I needed to get in my house. And he mentioned to me that he would stop by on duty and take a look and see if you had moved out of the house or not yet.

Q. Let's get something straight.

A. Okay.

Q. You had heard because we were in constant contact. In fact what happened was my victim's advocate, Debbie Brockman, called Rash(ph) and said we will let you know --

A. Yes.

Q. -- because Rash had been calling so many times -- the person you were staying with -- trying to find out when I was going to get out, which I was trying very hard to.

A. Yes.
Q. And finally Debbie Brockman, my victim's advocate, called him. So it's not as if you hadn't heard from me in a while. It was one to two days.
A. Okay, yeah. It was a couple of days I hadn't heard from you and I mentioned it to Steve. And he said he would stop by and see if you were still in the house. And I guess one night on graveyard he came down the driveway with his lights off and checked to see if you were still there, because he called me the next day and said it appeared there was still somebody in the house, the lights were on or something like that.
Q. Right. But he never came knocking on the door or anything else?
A. No, he told me he just came down the driveway.
Q. And this was before he was supposedly made, quote/unquote, the liaison?
A. I don't remember whether he was a liaison then or not.
Q. Is it normal procedure for a police officer who -- especially with the Brown laws(ph) -- for a police officer who is friends with another police officer, while he's on duty, not through 911, not through his commander, but while he's on duty, to stalk somebody, to actually drive halfway through their driveway and scare the living heck out of them?

A. Well, of course not, no.
Q. Is it his duty -- should he have written this in his log?
A. We don't -- I don't know if they keep logs.
Q. You don't know they keep logs?
A. No. We didn't keep a log at Port Orchard. We'd have to log in everything we did.
Q. Okay. Is it legal what he did?
A. Well, I don't know that there's a law against it, but it's certainly not proper procedure.
Q. Wouldn't he have to at least announce himself?
A. No.
Q. There was no criminal activity going on here.
A. You wouldn't have to announce yourself. You can pull down a driveway or check anything you want when you're on patrol. You don't have to announce yourself.
Q. But he checked just because you asked him to?
A. Well, actually I didn't ask him to. He offered me. I did not ask him to check, and I'm serious about that. I told him that "I wish I knew whether she was getting out yet." And then I commented, "Maybe she got out already and they're not letting me know yet." You know --
Q. You know, Dennis, I'm sorry --
A. -- I'm telling you --
Q. -- that's a lie because you know I would never leave Ginger in this house.

A. I figured you would have taken her.
Q. You were told many times during that time --
A. Tammy, I don't want to argue. I'm telling you what I told --
Q. But what I'm telling you is what I had told you many times, and Debbie Brockman said, that we would let you know, and even your Commander Marti, that we would let you know because of Ginger --
A. Yes.
Q. -- the dog.
A. Yes. I am telling what I told Steve that night.
Q. You know that I would not have left this house without letting you know. And Debbie, just a day or two previous to that, had called Rash and said that we will call you and let you know.
A. Yes.
Q. Al Townsend, your chief, he knew you and Steve Sipple were very good friends?
A. Yes.
Q. He also knew that Steve Sipple was president of the motorcycle club you were in; correct?
A. Yes.
Q. Please tell me how Steve Sipple became the liaison without anybody telling me that? Who was drunk at night, who would call me?

A. Well, I had a conversation with Al Townsend that, you know, Steve knew you and that we were good friends and that he could be the go-between. And at that point Al Townsend said, "It would be good to keep this outside the department. Let's just use Steve." And I believe there might have been an e-mail or some type of communication between him and Steve asking Steve to do it. But, if I recall, policy is he should have appointed someone in the department like Marti, who's my superior, to be the go-between.

Q. Oh, that's policy?

A. I believe it is. Why he wanted to keep it outside the department I don't know. In retrospect it wasn't a smart move because Marti, being my superior officer, could have given me a direct order where Sipple couldn't have. And I think Marti was probably a better go-between for a while anyway.

Q. So Al Townsend knew that you and Steve had been friends for about 20 years, was president of your motorcycle club?

A. Correct.

Q. He knew that you guys were very good friends, only that Steve knew of me but he -- nothing else?

A. Correct.

Q. That this was your close friend?

A. Yes.

Q. Thank you. You also showed up with Steve at one of Al

Townsend's things, picnics or something?
A. It was at George Counselman's kid's birthday, but he through a barbecue for the department. Townsend didn't show up. Marti showed up. And Steve and I were there in our motorcycle getup.
Q. Oh, so they knew you were in a motorcycle club together at that time?
A. Yeah. That was --
Q. Besides being good friends?
A. Yeah. That was back in June.
Q. But everybody knew that you and Steve were very good friends?
A. Yes.
Q. You kind of threw me off because I wanted to ask specifically about us, Dennis, and then I was going to make another tape with the illegalities of Steve and Townsend and --
A. Right.
Q. -- so I'm very thrown off and I'm all over the place. I'm very shaken up. And some things are a little bit different than the other day.
A. I think I've been --
Q. Townsend gave you back your service revolver?
A. Correct.
Q. Immediately after the diversion?

A. December 19th we went to court and the charges were dismissed per diversion -- or put on hold for two years for the diversion. I think it was the next day I went down and picked up my, my old police service revolver from the Port Orchard Police Department. I walked into the -- Dale Schuster was working. Chief Townsend wasn't there. I asked Dale now that this was all over if I could pick up my, my pistol. And he goes that he couldn't authorize that, that he'd have to call Townsend. He called Townsend. Townsend didn't answer his phone so I think he sent him a text message. There's something about him and texts where he only answers texts. And he either texted Dale back or called Dale back and told him to go ahead and give me the gun back. So Dale wouldn't give it to me until Townsend said it was okay. Townsend said it was okay. And it was like the day after, December 20th I believe, when I got my gun back. And I still have that gun in the safe upstairs.

Q. Is that normal procedure for a chief to give back a gun?

A. In retrospect I probably -- if I was a chief I would have probably told the officer, "I'll hold it to you till your diversion is done."

One thing I will say that Dale did was he unloaded the gun and gave me the gun unloaded and took all the bullets. But the reason why he did that was because the bullets were owned by the department. Because the department -- it

was -- it was -- I purchased the gun but I could only use department issue ammo on duty. So he unloaded everything and took back the department's ammo and gave me everything unloaded.

Q. But you could just go out and buy ammo if you want --

A. Well, I had ammo in the safe. I've got a whole bunch of boxes of ammo in the safe. The gun is loaded now, but it's sitting in the safe upstairs.

I don't know what you mean that things are different today than they were a couple days ago. I've been honest and even more honest I feel. I've admitted and said yes to a lot of things that weren't even brought up a couple days ago. I'm not -- if there's something that you feel I said different --

Q. That you were trying to drive me crazy.

A. I said yes to that. What did I say a couple days ago that I'm not saying now? Maybe I'm misunderstanding --

Q. Well, now you're like, oh, you were only trying to drive me crazy when you were taping me but --

A. No, no, no, no, no, no, no. That's not what I meant. What I said was -- you asked if I was trying to drive you crazy and I said to you, "Yes, I was trying to drive you crazy." And I said, for example, when I just didn't know. And there's probably quite a few other situations, Tammy, that I'm just not recalling right now. But what I'm trying -- for the

purpose of the tape, I'm trying to say that I wasn't trying to limit it to when I was taping. I was using that as an example. But those weren't exclusive. There were many more other situations. And more situations I'm not even mentioning right now. Does that clear it up?

Q. Somewhat. But there were times that you were trying to make -- you always told me I was crazy and paranoid.

A. Yes, I did.

Q. Even when it was the truth you would tell me I was crazy and paranoid.

A. Yeah. And an example of that was with my ex, when I was talking to her when I was out of the house, and you found out about it. And I was telling you, "No, no. What do you want me to lie? You're crazy. You're paranoid." Yes. And I'm only bringing that -- I'm not saying that's the only time. I'm just bringing it up as an example that, yes, I did. I'm trying to be honest.

Q. But you were also just trying to make me crazy so that if I had a breakdown or if I did something really bad I could be arrested and you could be totally cleared and once again the good guy.

A. Yes. I said that earlier.

Q. And you knew I was by myself here and the mind fucking games --

A. Yes.

Q. -- you did a lot of mind fucking, Dennis.
A. I know that.
Q. And by myself and having you as my only human contact.
A. Right now, other than the people I know at work, you're my only contact because I don't talk to any of my old friends. And that's my own --
Q. I was totally isolated, Dennis, and you were playing such games with my head.
A. Yes.
Q. The mental was far worse than the physical.
A. I know.
Q. There's so many things I wanted to put on the tape. But I do want to know now and I just want to clearly iterate it because I'm sick of living in the terror of being arrested --
A. I know well, ask the question --
Q. -- put into a loony bin.
A. You're not gonna -- okay, ask the question because this is about to run out I think.
Q. And I know I've asked before but were you purposely setting me up to get arrested if ever I called 911, no matter how much danger I was in, if I called 911?
A. Yes.
Q. Did you purposely --
A. Yes.

Q. -- stand in the room and you'd be at one side and I'd be at the other and you'd scream, "Stop hitting me"?
A. Yes.
Q. And at times I actually replied --
A. "What, do you have a tape recorder?"
Q. Yeah. Because it just was like --
A. I remember.
Q. -- so far out there. And did you purposely push arguments -- you said once you bought the tape recorders -- the other day you said something?
A. Yeah. That I pushed arguments to the limit to tape you at your worst without taping what I had done before that to set you up. I did do that and I'm sorry. That's why I'm making this tape now because it's time for me to be honest and put this behind us and be penitent. And that's why I confessed that to God last summer that I would never do it again. Am I setting you up now? No. Have I done anything to set you up now? No. Do I have anything where I could set you up? Excuse me -- no. I was doing it in the past. And I realize the error of my ways. And now I'm just putting my faith in God. I'm a very sinful man. I've done a lot of bad things. And I'm trying to make my spirit and soul right with God and with you if that's possible.
Q. So in the beginning when you were lying to everybody about the computer, about me beating you up, about me being crazy

and going on with these stories to Steve Sipple and everybody at your department and your friends and everybody, why didn't you just ask me to leave if you didn't want me? Why did you set me up to get arrested?

A. Well, I think we were arguing a lot and you kept saying you were going to leave and then you weren't, and then you were going to leave and then you weren't, and then you were going to leave and then you weren't.

Q. Because you asked me back, Dennis.

A. That's true I did. I think we were both driving each other crazy. Or I was doing more of the driving crazy. And then I started getting drunk and mean and mad and stupid. And despite all that all you've done is stand behind me --

Q. Did you want to get rid of me and just hate me? Did you want to make me pay a price?

A. No, I didn't want to hate you. You were in a very bad situation having no money and nowhere to go, but I just wanted you to go. I didn't hate you, though.

Q. So you figured by getting me arrested, falsely, I'd be gone?

A. I don't know how to answer that.

Q. Truthfully.

A. Well, I guess I'd have to say yes.

Q. And this was all because of the Daniel situation?

A. Yes. That's all our fights were about then.

Q. I mean, you're sitting there saying that we were fighting

and going back and forth, Dennis.

A. Well --

Q. -- but I was leaving, I wasn't leaving. That's because you were calling and asking me to come back. And I loved you and I believed you every time.

A. I know.

Q. All I wanted was us to be happy.

A. Well, the reason why I'm doing all this now is because I do love you now. I didn't then but I do now. And I know I was a very bad person, and I'm trying to make it right. And the truth hurts. I didn't expect you to ever trust me again or love me. But I feel that if I do this at least you'll know I'm really trying to be honest and put all the bad behind me. That's the only thing I can do for you right now. Can we take a break?

Q. Yeah.

* * * * *

(AUDIO ENDS)

A F F I D A V I T

I, Jane Wilkinson, do hereby certify that the foregoing transcript, prepared on October 31, 2011, from a recording, is correct and accurate to the best of my ability.

_____

Jane Wilkinson

Appendix B

ORIGINAL

PROSECUTOR

#10-004701

911 call – Dennis McCarthy
Page: 1

FIRST CALL

Dispatcher: 911, what are you reporting?
DM: Yes, hello?

Dispatcher: Yeah, can I help you?
DM: We need…yes, we need an ambulance…

Dispatcher: At what address?
DM: …she's down…

Dispatcher: What…
DM: …my girlfriend fell and broke her leg…

Dispatcher: …okay, what…
DM: …she needs…we need an ambulance.

Dispatcher: …sure, I'm gonna send you one, what's your address?
DM: It's 889 Southeast Olalla Valley Road.

Dispatcher: Okay, what part of her leg, upper or lower?
DM: Uh, the lower part (unintelligible)…

Dispatcher: Lower part, okay. Hang on just a second. How old is she?
DM: She's…she's for…forty-seven.

Dispatcher: Forty-seven. Just a minute.
DM: Yes.

Dispatcher: How did she fall, sir?
DM: She fell out the window I believe (unintelligible)…

Dispatcher: Fell out the window?
DM: …yes. (Unintelligible)…

Dispatcher: Okay, how far was the…
DM: …(unintelligible)…

Dispatcher: …well, how far was the window?
DM: It was like twelve feet or something…

Dispatcher: Okay.

DM: …just get a God damn ambulance, okay?

Dispatcher: Yeah, I'm sending somebody, sir, I need to send different people now, hang on just a second here.
DM: In a lot of pain.

Dispatcher: I understand that. How did she fall out of the window?
DM: She was hanging curtains.

Dispatcher: She was what?
DM: Uh…just get an ambulance, I'm not answering anymore questions, get an…

Dispatcher: I need to know how she fell, sir.
DM: She…she was hanging curtains for the third time.

Dispatcher: Okay, I can't understand you.
DM: Curtains, do you know what curtains are, drapes?

Dispatcher: I…I understand you now, sir. I'm getting somebody to you. Is she outside or inside?
DM: She's outside laying on the deck.

Dispatcher: Okay, just so you know, I'm sending somebody to you, okay?
DM: Well, thank you.

Dispatcher: Is your house visible from the road?
DM: No, it's off…way off the road.

Dispatcher: Okay, can we get directions?
DM: What's that?

Dispatcher: Can we get directions?
DM: It's…okay, come down Olalla…tell them to hurry up, okay, she's in a lot of pain. She might've injured her head.

Dispatcher: Okay. You know, they don't…they don't take their time, you know, I'm sending somebody.
DM: Okay, it's on Olalla Valley Road, it's north of Mullenix.

Dispatcher: Okay. And it's down a longer road?
DM: Yes.

ORIGINAL

PROSECUTOR

911 call – Dennis McCarthy
Page: 3

Dispatcher: Okay, one second here. Is the dirt road marked with your driveway?
DM: What's that?

Dispatcher: Is your dirt...is the dirt road marked with your address?
DM: Yes, I'm the only house down at the end of the driveway.

Dispatcher: Okay. Is...but is your driveway marked with your address?
DM: Yes it is.

Dispatcher: Okay.
DM: The mailbox and the post.

Dispatcher: Okay. And is it your address 6889 or your name?
DM: Yes, I said 6889 and you've got it right there on your screen.

Dispatcher: I'll certainly let you go, do you need to administer medical help to her while...
DM: Yes I do.

Dispatcher: Okay.
DM: So would you please just get them here?

Dispatcher: Do you know how to do that or would you like my help with...
DM: I...I know how to do it...

Dispatcher: Oh...
DM: ...I know how to...I got to go, just get them here, okay.

Dispatcher: Thank you, sir.

SECOND CALL

Dispatcher: 911, what are you reporting?
DM: Um, this is...Dennis, I'm calling back from 6889, where's this ambulance...

Dispatcher: Yes sir...
DM: ...she's in...

Dispatcher: ...they're in route to you, sir.
DM: Yeah, I...um, it's been ten minutes, this is ridiculous.

Dispatcher: Yeah, we're sending somebody to you, as soon as you called we entered a call for them to come to you.

DM: Well, you know, do you have an ETA?

Dispatcher: I…I don't. They've been in route for five minutes.
DM: Okay.

Dispatcher: How's she doing? Can you tell me?
DM: She's not doing very well and she believes she hit her head, I was in the shower, she fell down and while she was hanging curtains and she landed on the deck.

Dispatcher: Okay, was…was the window open or did she fall through the glass?
DM: No, the window was open…

Dispatcher: Okay.
DM: …she…she was using the, uh…the windowsill to stand to hang the curtains and her leg slipped out and she fell over.

Dispatcher: Okay, just…
DM: From a height of about twelve feet.

Dispatcher: Twelve feet, okay. Okay, hang on, just let me update them now, hang on just a moment if you can.
DM: They're on the way.

Dispatcher: Hang on one second here. And did she tell you that, that she'd…she'd slipped off the ledge?
DM: Uh, I was in the shower, I heard her…I heard a thump…

Dispatcher: Okay.
DM: …and (unintelligible) 'cause the show…I had the window open and I'm right next door…

Dispatcher: Okay.
DM: …I ran downstairs, she's got the curtains wrapped around her as she's laying there on the deck…

Dispatcher: Okay.
DM: …and…

Dispatcher: Just a second here. I'm getting this in. Okay. Has she been able to talk to you coherently?
DM: No.

ORIGINAL

PROSECUTOR

#10-004701

911 call – Dennis McCarthy
Page: 5

Dispatcher: Okay. Poor thing, well, we're sending somebody that way, okay?
DM: Okay.

Dispatcher: Alright, thank you.

WASHINGTON STATE ATTORNEY GENERAL

October 22, 2012 - 11:06 AM

Transmittal Letter

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-NO. 42803-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. DENNIS L. MCCARTHY, Appellant.	DECLARATION OF SERVICE

DAISY LOGO declares as follows:

On Monday, October 22, 2012, I deposited into the United States Mail, first-class postage prepaid and addressed as follows:

Jodi R. Backlund
Backlund & Mistry
P.O. Box 6490
Olympia, WA 98507

Dennis L. McCarthy, #813355
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Copies of the following documents:

1) Motion to File Over Length Brief Of Respondent
2) Brief of Respondent
3) Declaration of Service

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 22nd day of October, 2012.

DAISY LOGO

WASHINGTON STATE ATTORNEY GENERAL

October 22, 2012 - 2:13 PM

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